



Reinforcements
MANAGEMENT CONSULTING

FOCUS ON CIVIC RESPONSIBILITY

COUNCILLOR CONDUCT ACCOUNTABILITY IN NEW SOUTH WALES

A REPORT FOR THE HON. WENDY TUCKERMAN MP, MINISTER FOR LOCAL GOVERNMENT.



October 2022

DISCLAIMER AS TO LEGAL ADVICE

The observations and advice contained in this report do not purport nor claim to represent formal legal advice. The content of the report is formulated from the experience of the consultant as a practising local government CEO over many years and from more recent experience in consulting to the local government industry in Australia, including consulting to state governments about local government systems.

Commentary and advice on the interpretation of the legislation referenced in the report is presented in this context and from the perspective of a professional public administrator applying good governance principles to the implementation of systems, processes and procedures to secure effective, transparent and accountable responses to that legislation.

Although developed in good faith and with due diligence the recommendations for action arising from the report should be considered in the context of the Office of Local Government's own formal legal advice.

ACKNOWLEDGEMENTS

As always in such reviews, the gathering of information and its analysis and discernment for meaningful conclusions can only be achieved with the effective cooperation of a wide range of stakeholders including, in this case, all those who took the time and opportunity to make submissions or otherwise offer their views. Also of importance to the review was the considered input of the various peak organisations and government agencies with a significant stakeholding in the effective performance of the NSW local government sector.

We gratefully acknowledge and appreciate the willingness of the Deputy Secretary, Executive Director, Directors and staff of the Office of Local Government, as well as external parties, to provide access to relevant material and to offer candid insights into the circumstances surrounding the policies, processes, procedures and practices being examined.

Special thanks are extended to Adjunct Professor Graham Sansom and Ms. Gail Connolly for their invaluable assistance and support in the final framing of the review report.

Report prepared by:

Reinforcements

Management Consulting

Principal Consultant:

Gary Kellar PSM

MBA.,B.Bus. (Public Admin), FAICD, FLGMA, FIPAA, JP (Qual)



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EXECUTIVE SUMMARY

The New South Wales Minister for Local Government initiated this review to ensure that local communities and councils have confidence in the state's councillor conduct accountability framework – specifically, the process for making complaints, the investigation process, the timeliness of disciplinary action, the equity of the determinations and the disciplinary action and penalties available.

Over some period of time, various stakeholders in the system have been concerned that the current accountability framework is not serving the best interests of either the government or local communities in addressing acts of misconduct by local government officials.

The consultant sought to confine the extent and cost of the review to a reasonable scale but still achieve focused evaluation of the issues involved. As such, the review methodology comprised:

- examining the legislative and regulatory basis of councillor conduct accountability as exercised by the Office of Local Government (OLG), key among these being the Model Code of Conduct for Local Councils in NSW and its associated administrative procedures made under the Local Government Regulation
- examining processes, procedures and practices prescribed for the handling of complaints about councillor conduct
- inviting public submissions from stakeholders in the process to help inform the review
- engaging with particular stakeholder groups and the OLG to appreciate specific aspects of the accountability framework
- a study of similar frameworks in other jurisdictions, commissioned from Adjunct Professor Graham Sansom, to identify any models of use for comparative purposes
- examining the outcomes from public inquiries undertaken in relation to matters arising from or involving circumstances related to councillor conduct
- analysing the range of issues arising from these activities to identify opportunities for improvement.

A stakeholder consultation paper was released in November 2021 and invited submissions in response, which closed on 28 March 2022.

At the formal closing time, 45 submissions were received and consultation remained open to any other individuals, agencies or organisations wishing to provide input. These were accommodated by receiving their written comments and by interview.

The following key concerns were reflected in a number of submissions made to the review:

- actual and perceived conflict of general managers in the key role of preliminary assessor of complaints against councillors
- actual and perceived lack of independence of councillors determining the disciplinary penalty to be applied to their fellow councillors
- arrangements for appointing panels of conduct reviewers and the assignment of cases to individual conduct reviewers
- variability of competence and diligence of conduct reviewers
- the restricted power of councils to impose penalties for proven breaches of the code of conduct
- lack of clarity in the code of conduct concerning various classes of behaviour and the manner of dealing with them
- the length of time taken to review and investigate complaints both by conduct reviewers and the OLG
- the complexity of the framework that impedes early determination of complaints and adds to the cost of using the framework
- the lack of appropriate penalties able to be applied to substantiated misconduct
- the lack of deterrent in the penalties historically imposed by the OLG and NCAT.

Adjunct Professor Graham Sansom was commissioned to prepare research material comprising a comparative analysis of the councillor conduct accountability frameworks in the states and Northern Territory as a key input to this review.

In summary the research finds:

- Most jurisdictions have mandatory/model codes that are limited to elected members and are much briefer.
- Most jurisdictions require considerable detail or use of a statutory form when complaints are lodged.
- Complaints are typically lodged with the relevant council in the first instance except in Queensland where the Office of the Independent Assessor is the focal point. In most jurisdictions, complaints are ‘triaged’ by the executive officer or chair of the relevant statutory panel. The council chief executive’s role is typically limited to appointing a complaints officer and/or providing administrative support to the handling of complaints.
- There is an evident trend towards enabling councils to handle poor conduct in meetings separately from the broader complaints system, at least in the first instance.
- For ‘mid-range’ breaches all jurisdictions have legislated statutory panels to determine complaints and/or decide if they should be referred elsewhere.
- All Acts (except South Australia) specify serious offences, as opposed to lesser breaches, and associated penalties that can be imposed.
- There is an evident trend in enabling panels to impose stiffer penalties for ‘mid-range’ breaches, including suspension for up to 3 months or as much as 12 months.
- In marked contrast to NSW, there is little prescription in other states of the parties’ (and particularly the respondent’s) rights to seek/require review loops at various stages during the process – as opposed to appealing the decision at the end.
- No other state agency has been given the extensive role and authority exercised by the NSW OLG – notably its heavy involvement in dealing with and determining mid-range complaints, as well as investigating the most serious breaches, its right to intervene (as opposed to assist) in lower-level matters being handled for councils by reviewers, and its power to impose penalties.
- As a general rule, the equivalent agencies (and their chief executives) elsewhere are largely limited to overseeing the system and supporting and advising the Minister as required.

Current issues

The review has found that councillor conduct accountability is not a problem for ALL councils in NSW, but is a serious problem for a few. OLG has very limited capacity under the current framework, structures and resourcing to effectively address the issues identified. The current framework, although formulated with good intent, contains structural, strategic and operational deficiencies that act against its effectiveness

Particular areas of concern to the sector include,

- lack of certainty
- lack of consistency
- lack of timeliness
- lack of independence.

The current framework has operated for more than a decade and has not made any substantial progress in reducing councillor conduct complaints. Minor changes to legislation and processes have not addressed the key issues. Recent public inquiries continue to find the same weaknesses that remain unaddressed. Powers available to OLG and NCAT are not sufficiently applied to deter misconduct. Systems, resources and practices available to OLG are too constrained to adequately respond.

Timeframes for concluding assessments and investigations particularly at OLG level are inordinately long and can create collateral reputational damage for those involved. The direct cost to the sector of the current framework is estimated to be around \$3 million a year, which does not include the many hidden costs incurred by the organisations and individuals involved and the resultant distraction from the effective policy and decision making role of councils. Nor does this include the very significant cost of public inquiries, whose proceedings bring light to bear on councillor conduct issues that lead to more serious breaches of public trust.

Key stakeholders in the sector have lost confidence in the current arrangements. Further ‘tinkering’ with the current framework will not bring about the quantum change required. Strong leadership through a truly independent model is required.

Target outcomes

The review has embraced the central aim of addressing the current issues with the councillor conduct accountability framework to achieve:

- improved understanding for all stakeholders through clearer codes and guidelines and mandatory education and training
- improved meeting behaviour through supporting the authority of mayors/chairs
- greater independence of process at arm's length from local government officials and OLG
- reduced time and cost of complaints process by dealing with minor matters expeditiously through independent panels
- better investigation outcomes through accredited reviewers, consistent procedures and equitable appeals process
- greater deterrence of misconduct by applying sanctions more aligned to the seriousness of the offences
- increased understanding of the underlying issues of councillor conduct accountability through effective research and analysis
- reduced complaint volumes over time and fewer public inquiries involving councillor conduct
- greater accountability on behalf of councillors and councils through transparent reporting
- overall general benefits to local communities from improved council performance.

The new framework

In order to strike the required balance between the various legitimate stakeholder interests and to address what are seen to be the key shortcomings of the current framework, the following initiatives are proposed by the review.

1. Create a separate code of conduct for councillors, covering all forms of meetings.
2. Introduce mandatory councillor training and CPD, including pre-election training with avenues for enforcement.
3. Revise the Code of Meeting Practice – strengthening the mayor's/chair's powers and obligations.
4. Introduce a new complaints management process involving Independent Councillor Conduct Review Panels, removing the role of the general manager and the council from the process.
5. Provide formal accreditation of panel chairs and conduct reviewers.
6. Codify offences and enforcement options (increased penalties for serious and repeat offences).
7. Streamline appeal options.
8. Introduce independent and authoritative oversight by a Councillor Conduct Commissioner.

Consolidating the framework

The most important initiative from the review is to recommend the establishment of a Councillor Conduct Commissioner. This will bring together all the elements of the new framework under a single independent and focused authority to oversee its orientation toward improving the fundamental indicators of success. The primary indicator will be, over time, reducing the number of complaints about councillor conduct and the general improvement of community trust and confidence in the civic responsibility of elected councillors.

Establishing the Office of the Councillor Conduct Commissioner will provide the opportunity for the sector to embrace a new model of regulation that concentrates as much on educating and encouraging councillors to perform at their best for their communities, as it does on detecting and penalising misconduct. The setting of clear standards and expectations, not only for councillors but for conduct reviewers and their independent panels, will provide a streamlined, impartial and professional complaints management process to minimise the disruption and cost currently being imposed on the sector.

Costs of reform

Although there are costs associated with implementing the proposed new framework, the majority of these would need to be met whether or not the new Commissioner and Panel arrangements proceed. For example, providing the OLG with an effective case management system and improving training and conduct reviewer accreditation as well as improving Sector knowledge management will require investment. Conversely, as the proposed reforms take effect, they should deliver considerable cost savings from the current state of affairs with improved conduct compliance generating fewer complaints and thus requiring fewer investigations.

Implementation of reforms

The best intentions of any reform agenda are only achieved through committed and diligent implementation. The review acknowledges the importance of not just changing the structural appearance of the councillor conduct accountability framework but also the need to accompany the change with strong leadership toward a culture of integrity and accountability that all stakeholders see as their responsibility to uphold and support.

The review recommends establishing a suitable and representative task force to help guide the legislative, structural and administrative changes needed to ensure the new framework's best chances of success in achieving the aims outlined above.

There is an opportunity from this review for the NSW Government and the state's local government sector to make a significant step forward toward a new environment where public confidence in grassroots civic responsibility is restored and strengthened.

SUMMARY OF RECOMMENDATIONS

LEGISLATE

- I. That a statement of behavioural standards for councillors be included in the Local Government Act 1993 to provide greater statutory obligation for their observance.
- II. That a new code of conduct for councillors be developed fully separate from the employees code and focused on the specific context of elected members.
- III. That the new code establish clear alignment with the guiding principles for councils contained in Section 8A of the Local Government Act 1993, the proposed behavioural standards referred to in recommendation I, and with the councillors Oath and Affirmation of Office.
- IV. That the new code:
 - a. apply to every forum in which councillors participate in their capacity as an elected member of the local government including Regional Planning Panels, Audit Risk and Improvement Committees, Advisory Committees as well as workshops briefing sessions and the like.
 - b. incorporate a schedule of councillor conduct standards and jurisdictional enforcement options as described in Section 8.1, clearly defining the behaviours that represent breaches of the code of conduct according to relevant classes, together with the associated sanctions and penalties applicable to those breaches.
 - c. address any other deficiencies of uncertainty and ambiguity identified elsewhere in this report.
- V. That the councillors oath and affirmation of office prescribed in Section 233A of the Local Government Act 1993, be amended to make specific reference to faithful observance of the councillors code of conduct. (See **Attachment C**)
- VI. That serious breaches of the code of conduct be treated as breaches of the councillor's oath and affirmation of office.
- VII. That Section 233A of the Local Government Act be amended to clearly state the consequences of a councillor breaching the oath or affirmation of office.

EDUCATE

- VIII. That mandatory pre-nomination training be introduced for all candidates as a pre-condition of nominating for local government elections and appropriate amendment to the NSW Electoral Act 2017 be sought for this purpose.
- IX. That the Office of Local Government in consultation with LGNSW and appropriate Sector stakeholders be tasked with developing the pre-nomination training course to be offered online using the Queensland model for guidance.
- X. That attendance at councillor induction courses be made mandatory and completion of the required training within three months of election be made a precondition of newly elected councillors whether freshly elected or returning, participating in council meetings.
- XI. That mandatory supplementary training for mayors be required to include specific training on:
 - a. conducting meetings and the code of meeting practice, including managing disorderly meeting behaviour.
 - b. conducting performance reviews involving the council's general manager.
- XII. That a uniform program for continuing professional development and refresher training for councillors and mayors be developed nominating mandatory content requiring attendance of councillors.
- XIII. That all training content for mandatory councillor training topics be developed in consultation with LGNSW or appropriate Sector stakeholders and be required to be delivered by trainers accredited in those topics.
- XIV. That appropriate sanctions or penalties be imposed for non-attendance by councillors at mandatory councillor training courses.

PREVENT

- XV. That all meetings of councillors even if closed to the public for legitimate confidentiality reasons be audio visually recorded for transparency and accountability.
- XVI. That all meetings of councillors including workshops and briefings require written declarations and recordings of conflicts of interest.
- XVII. That as well as addressing the matters mentioned elsewhere in this report concerning review of the code of conduct, attention be given to addressing the transparency and risk issues mentioned in Section 5.

DEVOLVE / EMPOWER

XVIII. That the power of mayors and meeting chairs to manage disorderly meeting conduct be strengthened by including power to order an offending councillor

- a. to cease the act of disorder and desist from repeating that act for the duration of the meeting.
- b. to refrain from participating in discussion or debate on business before the meeting for a specified item or specified time or for the remainder of the meeting, consistent with the current power of the Chair to “mute” a councillor’s audio link at an audio-visual meeting.
- c. to withdraw from the meeting for a specified time or for the remainder of the meeting.

XIX. That Section 10 of the Local Government Act 1993 be amended to empower the mayor or chair to expel a disorderly councillor without needing to obtain the resolution of the meeting.

XX. That the code of conduct include provision for mayors/meeting chairs who fail to deal with disorder or misuse the power to be subject to complaint for serious misconduct.

XXI. That the code of conduct and code of meeting practice clarify that all councillors attending meetings have an obligation to maintain order and assist the mayor/meeting chair is maintaining order.

XXII. That provision be made for OLG intervention by way of providing or partnering with LGNSW or other appropriate Sector stakeholders in providing councils with a meeting conduct adviser or meeting moderator where appropriate.

DETECT and MANAGER

XXXIII. That the framework for councillor conduct accountability be restructured as follows:

- a. Requiring complainants to submit complaints using a prescribed complaint form supplying all relevant information to assist assessment of the complaint.
- b. Establishing jurisdictions for dealing with councillor conduct complaints as follows:
 - i. Mayors/meeting chairs
 - ii. Independent Councillor Conduct Review Panels

iii. Councillor Conduct Commissioner

iv. NCAT

v. ICAC and other agencies

- c. Adopting of a schedule of councillor conduct and jurisdictional enforcement options to underpin authority of the various jurisdictions involved in the framework.
- d. Removing current powers and functions of council general managers to process and/or determine any matters associated with councillor conduct complaints.
- e. Create powers for the council complaints coordinator to receive and refer correctly lodged complaints concerning councillor conduct to the relevant Independent Councillor Conduct Review Panel, as outlined in Section 7 of this report.
- f. Removing current powers and functions of councils to determine outcomes associated with councillor conduct complaints.
- g. Creating Independent Councillor Conduct Review Panels for the assessing, investigation and determination of councillor conduct complaints, including making orders for sanctions and penalties, as outlined in Section 7.6 of this report.
- h. Assigning of local governments to the jurisdiction of specific panels according to a process to be developed in consultation with appropriate Sector stakeholders.
- i. Recruiting appropriately qualified personnel as chairs and conduct reviewers to panels with panel chairs and members to be appointed by the Minister in consultation with appropriate Sector stakeholders.

XXIII. That the Procedures for the Administration of The Model Code of Conduct for Local Councils in NSW 2020 be comprehensively reviewed to align with the proposed new framework for councillor conduct accountability as outlined in this report.

XXIV. That a system of procedural directives for Independent Councillor Conduct Review Panels be prepared by the Commissioner to enable the Minister to manage the operational environment of the Panel system for consistency and responsiveness to sector needs.

- XXV. That the Commissioner be required to maintain a central register of councillor conduct complaints and their management through the proposed framework, including for transparency, publishing appropriate details on the Commissioner's website.
- XXVI. That separate uniform investigations practice guidelines be compiled to guide panel investigations into councillor conduct complaints as outlined in Section 7.11 this report
- XXVII. That criteria and procedures be created for the referral of matters from the Councillor Conduct Commissioner to the OLG concerning implications of individual councillor conduct for the effective performance of a council.
- XXVIII. That a detailed implementation plan for the introduction of the proposed panels be made a priority for the Councillor Conduct Accountability Framework Implementation Task Force referred to in Section 11 of this report.
- XXIX. That the integrity of the Independent Councillor Conduct Review Panels jurisdiction be assured by according appeal rights to aggrieved parties only on the basis of denial of natural justice and through the usually available recourse to NCAT, with complaints about panel procedural performance being referred to the Commissioner for consideration.

DISCIPLINE

- XXX. That the proposed Independent Councillor Conduct Review Panels be provided with guidance as to the range and extent of penalties to be ordered within their jurisdiction, including guidance as to the determination of penalties for repeat offenders. The adoption of a schedule of Councillor Conduct and Jurisdictional Enforcement Options similar to that shown in **Attachment D** should be considered.
- XXXI. That more rigorous application of available penalties be adopted commensurate with the seriousness of conduct offences to act as deterrent to misconduct.
- XXXII. That the maximum period of suspension from meeting attendance or from official duties be increased for more serious or repeated conduct breaches.
- XXXIII. That in addition to existing penalties, monetary penalties be introduced for certain integrity breaches such as failure to register or declare pecuniary or substantial conflict of interest.
- XXXIV. That partial or full cost recovery from councillors be introduced where they are found to have committed repeated misconduct or integrity breaches or have contributed to unnecessary prolongation of the investigation.

DIRECT, AUDIT and INTERVENE

- XXXV. That appropriate protocols for the interface of the Councillor Conduct Commissioner and OLG be developed to ensure close cooperation in the implementation of the proposed new framework.
- XXXVI. That urgent consideration be given to providing OLG and consequently the Commissioner and proposed Independent Councillor Conduct Review Panels with an effective automated case management and knowledge management system.
- XXXVII. That the councillor conduct accountability framework be underpinned by greater data gathering and analysis of sector experiences to provide accurate reporting of conduct review outcomes and to inform ongoing initiatives for both preventative and responsive action on conduct issues.
- XXXVIII. That the councillor conduct reporting period be realigned to financial years to enable gathering of financial data concerning the cost of conduct reviews and improved management of the overall framework in terms of budget performance.
- XXXIX. That the arrangements for accreditation of councillor training programs and ongoing education of councillors be further defined and resourced, with options for partnerships between the Commissioner and appropriate Sector stakeholders in the design and delivery of courses being explored.
- XL. That the proposed Councillor Conduct Commissioner develop criteria and processes for the recruitment and appointment of Independent Councillor Conduct Review Panel chairs and panel members as outlined in Section 7.4 of this report.
- XLI. That the proposed Councillor Conduct Commissioner consider an initiative to join with similar agencies in other states and the Northern Territory to establish an annual forum of discussion on the topic of councillor conduct accountability for the purposes of knowledge sharing and cooperation.

ASSURE EQUITY

XLII. That the jurisdiction of Independent Councillor Conduct Review Panels be established to deal with councillor conduct complaints as described in Section 7 above and that avenues for appeal against panel decisions be confined to matters of denial of natural justice for submission to NCAT. Other issues questioning the procedural adequacy of a panel's determination should be referred by complaint to the Commissioner.

IMPLEMENTATION

- XLIII. That the cost of the Commissioner's and Independent Councillor Conduct Review Panels' role in the councillor conduct review accountability framework be recovered as far as possible on a fee for service basis from the local governments using the service.
- XLIV. That remuneration of Independent Councillor Conduct Review Panel chairs/conduct reviewers and charge out rates be approved by the Minister to provide certainty of cost structures.
- XLV. That a dedicated councillor conduct accountability task force be established to implement the recommendations of this Review.
- XLVI. That the composition of the task force comprise and the Councillor Conduct Commissioner, a project team and sector reference group as outlined in Section 11.2 above.
- XLVII. That the implementation plan have due regard to achieving early benefits through administrative change, while pursuing necessary legislative change.
- XLVIII. That in order to minimise any delay in activating the new framework the Minister appoint an Interim Chair to convene the proposed implementation task force and to advise the Minister on the introduction of necessary legislation and procedural arrangements required to establish the Office of the Commissioner and the framework for the Independent Councillors Conduct Review Panels.

1. INTRODUCTION

The New South Wales Minister for Local Government initiated this review to ensure that local communities and councils have confidence in the councillor conduct accountability framework – specifically, the process for making complaints, the investigation process, the timeliness of disciplinary action, the equity of the determinations and the disciplinary action and penalties available.

Over some period of time, various stakeholders in the local government sector have been concerned that the current accountability framework is not serving the best interests of either the government or local communities in addressing acts of misconduct by local government officials.

1.1 The review brief

The assigned terms of reference were:

1. Review the effectiveness of the framework for addressing councillor misconduct with particular reference to:
 - a. the standards of conduct set out in the Model Code of Conduct for Local Councils in NSW and the way these are applied
 - b. the process for making complaints under the Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW
 - c. the tools and process for conducting an investigation into alleged misconduct
 - d. the efficacy of the disciplinary actions and penalties available to councils, the departmental chief executive and the NSW Civil and Administrative Tribunal as a deterrent to councillor misconduct
 - e. the timeliness of disciplinary action in response to councillor misconduct.
2. Make recommendations about policy, legislative and operational changes to improve the system for dealing with councillor misconduct.

1.2 Methodology

The consultant sought to confine the extent and cost of the review to a reasonable scale but still achieve focused evaluation of the issues involved. As such, the review methodology comprised:

- examination of the legislative and regulatory basis of councillor conduct accountability as exercised by the Office of Local Government (OLG), key among these being the Model Code of Conduct for Local Councils in NSW and its associated administrative procedures made under Regulation
- examination of processes, procedures and practices prescribed for the handling of complaints about councillor conduct
- inviting public submissions from stakeholders in the process to help inform the review
- engagement with particular stakeholder groups and the OLG to appreciate specific aspects of the accountability framework
- a study of similar frameworks in other jurisdictions, commissioned from Adjunct Professor Graham Sansom, to identify any models of use for comparative purposes
- examination of the outcomes from public inquiries undertaken in relation to matters arising from or involving circumstances related to councillor conduct
- analysis of the range of issues arising from these activities to identify opportunities for improvement.

To ensure coordination of review effort, a Steering Committee and Project Control Group structure was established with representative of the OLG support team providing administrative resourcing for the review.

1.3 Consultation

The Project Control Group composed a stakeholder consultation paper in November 2021 and invited submissions in response, which closed on 28th March 2022. Submissions were invited by way of the usual channels employed by the OLG in its consultation processes. This included:

- a circular to each local government in the state
- a media release
- the OLG Have Your Say website
- mention at various forums attended by the Minister and officers of the OLG.

The consultation process was complicated by the postponement of the local government elections shortly after the review's initiation. It was decided that the submission period should be extended to allow newly elected councillors the opportunity to submit if they chose.

The resultant submissions were categorised for analysis according to the topic areas covered in the consultation paper.

At the formal closing time, the submitter profile comprised:

- 22 councils
- 7 private individuals
- 7 associates (employees, employee organisations, reviewers, etc.)
- 4 councillors
- 5 government bodies.

Total submissions = 45

Of these, three submissions sought to address matters outside the Review Terms of Reference and their views have not been included in this preliminary analysis. Their responses were shown in the analysis as 'No comment'. A number of submitters also requested their identity, or in some cases their submission, be held confidential.

Following the closing date, other submissions were received, together with additional information provided by others who sought to provide input. All information provided was welcome and considered.

Following examination of the submissions, consultation continued by analysing common themes and engaging with key stakeholders on issues arising. For example, a number of the submissions raised concerns about particular facets of the framework. Some suggested remedies and some left the response for consideration of the review. In developing those responses, it was deemed appropriate to seek additional information and advice from stakeholders who had a particular focus on the issues. In this respect targeted consultations were entered into concerning the options to be canvassed.

In terms of possible implementation issues likely to arise from suggested reforms the OLG and its Investigation Team were given opportunity to provide additional input.

The list of submitters and other stakeholders consulted is attached as **Attachment A**. Persons requesting their identity to be withheld are noted as 'identity confidential'.

1.4 Analysis of submissions

The preliminary analysis collated the submissions into the following broad categories against each of the topic areas.

- **No comment** – where submitters offered no comment either for or against change or where the submission was irrelevant to the review's terms of reference.
- **No change** – where submitters considered the current arrangements and practices to be adequate, sufficient, or workable if approached diligently. In other words, some submitters believed that any issues with current arrangements arose from inconsistent application by councils, conduct reviewers or the OLG.
- **Change** – where submitters believed that current arrangements needed to be subject to either minor or major change. The range of suggestions varied from procedural improvements to complete structural change. Hence these suggestions are listed in some detail in the preliminary analysis.

Broadly speaking, in respect of each of the chapter areas covered by the consultation paper, other than Chapter 5 - Costs, about 40 per cent of submitters on average sought some form of change to the current arrangements. In the chapter associated with investigation timeframes, the proportion was above 50 per cent.

Within the chapters, the number of submitters offering no comment on a particular issue averaged around 40 per cent of total submitters. These tended to be predominantly private individuals, individual councillors or government agencies. Only in a minority of cases did local government submitters offer no comment.

Generally, less than 20 per cent of submitters favoured no change to current arrangements in the respective chapter areas. Notably, in relation to investigation timeframes, that proportion dropped to 2.2 per cent.

The overall complexion of the responses is described in the following table.

NSW OLG COUNCILLOR CONDUCT REVIEW SUBMISSIONS				
Consultation paper element	No comment	No change	Change	Total
CHAPTER 1 - Objectives and expectations				
Codes of Conduct	15	17	13	45
Standards	23	8	14	45
Prescription	20	8	17	45
Types of Conduct	21	2	22	45
Training	19	8	18	45
	98	43	84	225
CHAPTER 2 - Complaint process				
Local assessment	17	10	18	45
General Manager's role	16	6	23	45
Mayor's role	19	21	5	45
Decline to investigate	23	7	15	45
Frivolous/vexacious	21	2	15	45
Conduct reviews	18	4	23	45
Informal resolution	22	4	19	45
Formal investigation	22	1	22	45
OLG oversight	22	3	20	45
	180	58	167	405
CHAPTER 3 - Investigation timeframes				
Timeframes	15	1	29	45
Investigation process	22	1	22	45
Summary dealings	24	1	20	45
	61	3	71	135
CHAPTER 4 - Outcomes				
Pre-Cornish powers	17	5	23	45
Apologies	23	3	19	45
Council powers	22	10	13	45
Appeals	26	1	18	45
OLG/NCAT powers	27	9	9	45
	115	28	82	225
CHAPTER 5 - Costs				
Costs	26	11	8	45
Accountability	28	4	13	45
Council cost recovery	25	18	2	45
OLG cost recovery	21	12	12	45
	100	45	35	180
TOTAL	554	177	439	1170

The following key concerns were reflected in a number of submissions made to the review:

- actual and perceived conflict of general managers in the key role of preliminary assessor of complaints against councillors
- actual and perceived lack of independence of councillors determining the disciplinary penalty to be applied to their fellow councillors
- arrangements for appointing panels of conduct reviewers and the assignment of cases to individual conduct reviewers
- variability of competence and diligence of conduct reviewers
- the restricted power of councils to impose penalties for proven breaches of the code of conduct
- lack of clarity in the code of conduct concerning various classes of behaviour and the manner of dealing with them
- the length of time taken to review and investigate complaints both by conduct reviewers and the OLG
- the complexity of the framework that impedes early determination of complaints and adds to the cost of using the framework
- the lack of appropriate penalties able to be applied to substantiated misconduct
- the lack of deterrent in the penalties historically imposed by the OLG and NCAT.

A more detailed summary of the submissions is provided at **Attachment B** to this report.

In consolidating the opinions in the submissions, there were common desired priorities for the complaints framework:

Simplify and streamline

- Reduce the volume of material in the code of conduct and procedures.
- Reduce the number of steps and multiple handing of aspects of complaints.
- Allow matters to be determined at the initial review stage as far as possible, commensurate with the nature of the conduct and related sanctions or penalties.

Provide certainty

- Remove ambiguous and unclear definitions, provisions, powers and processes.
- Provide more explicit directions as to expectations and practice.
- Ensure choices available in flexibility of approach do not breed confusion or create loopholes.

Provide consistency

- Ensure processes produce similar results in similar circumstances.
- Provide uniform practice directions for guidance of reviewers/investigators/decision makers.
- Ensuring consistency of quality (qualifications/ experience/approach) of conduct reviewers.

Ensure timeliness

- Remove barriers to expeditious processing of complaints, commensurate with care and natural justice.
- Provide implementation guidelines and tools to increase efficiency of process.
- Ensure monitoring and audit of process to maintain momentum.

Ensure independence

- Remove general managers and councillors from decision making in the Councillor conduct complaints process.
- Provide independent review processes with power to determine conduct issues.
- Ensure professional arm's-length investigation and independent peer review.

1.5 Interstate comparisons

From the commencement of this review it was recognised that New South Wales was not the only state focusing on the issue of councillor conduct and that experiences in other jurisdictions would prove insightful to how similar matters were being addressed elsewhere. Several states were recently or are currently undertaking similar reviews of their councillor conduct frameworks.

Adjunct Professor Graham Sansom was commissioned to prepare research material comprising a comparative analysis of the councillor conduct accountability frameworks in the states and Northern Territory as a key input to this review.

Extracts from that research are inserted in relevant sections of this report and comparative analysis tables can be found at **Attachment F**.

1.6 Developing findings and direction of reform

Preliminary findings were completed by July 2022, together with a roadmap for the direction the resulting reforms should take. This roadmap still contained various options that required testing and validating for practical implementation. To avoid unintended consequences, these options were also subject to an assessment of the risks likely to be encountered in applying any new or innovative solutions to the circumstances identified.

Opportunity was also taken to review outcomes of inquiries, investigations, and operations of agencies such as ICAC whose findings made reference to councillor conduct issues.

This final evaluation of the options was completed by the end of August 2022 and the Draft Report compiled for consultation with the OLG Management and other stakeholders by the end of September 2022.

2. DEFINING THE ISSUES

The commissioning of a formal review in any aspect of public administration gives rise to an assumption that there is a 'problem' to be addressed. In the case of the conduct of local government elected members, all states and territories in Australia have commissioned reviews (formal and informal) or amended legislation in the past decade. These were commissioned on the grounds that the current systems for monitoring compliance with the respective councillor codes of conduct, and dealing with complaints about breaches, could have been more effective in providing assurance of integrity and respect for statesmanship in the local government sector.

Queensland – 2016 with further review 2022

Western Australia – 2017/22

Victoria – 2021/22

South Australia – 2019/22

Northern Territory – 2019

Tasmania – 2021/22

Adjunct Professor Graham Sansom comments in his report:

'During the course of the project discussions have taken place with key informants in Queensland, South Australia and Western Australia. Graham Sansom Pty Ltd was closely involved in a similar review in Queensland in 2016, which led to sweeping changes focused on the establishment of the Office of the Independent Assessor (OIA) and a revamped Councillor Conduct Tribunal. Some aspects of those arrangements have been reviewed in light of concerns about the OIA's scope and method of operation: outcomes are awaited.'

In South Australia, having reached agreement with the Local Government Association, the government is implementing extensive changes to its system for dealing with what are now described as 'misbehaviour' and 'integrity' issues (see Attachment 1). The new system will come into effect in November 2022 following the local government elections.

In Western Australia, as part of a broader update of the Local Government Act, the state government has released proposals for similarly wide-ranging changes, centred on the establishment of an Office of the Local Government Inspector and upgrading the current Standards Panel as a new Conduct Panel, with the power to enforce stronger penalties. Those proposals are presented in Attachment 2. They appear to reflect elements of current practice in Queensland and Victoria, but were announced before the review of Queensland's OIA. The reforms are now being progressed with a view to implementation in late 2023, but much of the detail has yet to be finalised.

In Tasmania, a partial review of the Code of Conduct and complaints system began in mid-2021 and led to a draft Local Government Amendment (Code of Conduct) Bill 2022 which was recently the subject of further public consultation. The main changes proposed in the draft Bill are a standard code of conduct for councils plus voluntary adoption of a behaviour standard policy for councillors; councils to adopt a local dispute resolution policy to reduce the number of formal Code complaints; an Improved process for the initial assessment of complaints, to be handled by a legally qualified panel member, with an additional 'public interest' test to weed out those that whilst technically valid do not warrant further action; and the disclosure and management of potential conflicts of interest by Panel members.

*Arrangements in the Northern Territory and Victoria appear more stable, at least for the time being. However, a 'Local Government Culture Project' was recently completed in Victoria. It addressed, among other things, concerns about councillor behaviour and performance and may lead to further changes in policy, practice and perhaps legislation – although the relevant provisions were tweaked only recently with the promulgation of the new 2020 Local Government Act.'*¹

¹ Sansom 'Comparison of Councillor Conduct Accountability systems in Australian States', p1

Each jurisdiction has seen ‘the problem’ through a different lens and indeed the resulting conduct review frameworks have varied slightly to place emphasis on the issues seen as priority in their own state context and public sector culture. The common focus of these reviews, however, has been the effectiveness of the legislative and regulatory frameworks established to define the expectations of conduct by local officials, and the robustness of the systems in place to address any failures in meeting those expectations.

Publicly-elected office will always attract individuals who are passionate about the issues faced by their local communities. The differences of opinion about these issues often engender robust debate, which of itself is essential to the effective working of democracy. However, within this passion is the genesis also of disrespect, bullying and interpersonal animosity, which crosses the line of acceptable conduct by public officials.

The context of subject matter in which local government representatives are engaged for decision-making also creates prospects for a clash of public and private interests. This requires elected members to exercise keen self-awareness to anticipate when the line is being approached and the good judgement to avoid the crossing.

Although the NSW local government context has its own nuances, it is little different to that of the other states and territories.

2.1 The NSW experience

Recent experience in NSW indicates the incidence of councillors behaving in a manner that gives rise to large numbers of complaints is not widespread.

In the 2020/21 reporting period (from 1 September 2020 to 31 August 2021), there were 384 code of conduct complaints reported by councils and county councils about councillors or the general manager.

Of the 128 general purpose councils, 33 councils (26 per cent) did not submit an annual complaints report as required by Clauses 11.1 and 11.2 of the Procedure for the Administration of the Model Code of Conduct 2020. The remainder had to be followed up to provide data for this review.

The following images illustrate the dispersion of complaints across local governments for the three year period 2019 to 2021.²

2

From data provided by the NSW OLG

Of the 128 general purpose councils and 9 county councils, 37 councils or about 27 per cent, did not receive a complaint of any kind about the conduct of their councillors/general managers over that period.

Those who attracted between one and three complaints over that period (in other words, an average of less than one complaint per year) numbered 33 (24 per cent). In other words, 51 per cent of councils had little or no conduct issues involving their councillors/general managers.

Overall statistics during that period there were:

- 87 (63.0 per cent) with between zero and 5 complaints
- 19 (13.8 per cent) with between 6 and 10 complaints
- 13 (9.4 per cent) with between 11 and 20 complaints
- 19 (13.8 per cent) with more than 20 complaints.

There has been a 19 per cent increase in the absolute 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 as compared with the 384 received in 2020/21, although a peak of 400 was experienced in 2019/20. The reduction in the number of local governments since 2013/14 due to amalgamations may affect this observation, as one conclusion that could be drawn is that in 2013/14 there were more councils and councillors attracting fewer complaints.

The number of councils and county councils failing to lodge their annual code of conduct reports has tended to increase slightly over the past three years. Therefore, the accuracy of the information provided in terms of whole-of-sector relevance is less than desirable. As noted above in the 2021 reporting year, only 74 per cent of councils and county councils submitted their returns.

Another problem in analysing the data available is that the statistical returns combine complaints about both councillors and general managers. This makes it difficult to address issues specific to those different cases, especially since the administrative procedures for the two groups vary to some extent. Additionally, the data sets councils are required to include in their annual code of conduct complaint reports have changed since 2019, with some indicators no longer being recorded.

A number of more serious code breaches or acts of misconduct required escalation to the OLG during the 2020/21 period. These involved instances where there were often other underlying issues concerning the council's approach to its business. These matters involved not only individual councillor interventions but also corporate interventions such as Performance Improvement Orders (PIO) and initiation of public inquiries. Not all matters resulted in formal interventions, and some involve multiple intervention.

2.2 Outcomes

Although information concerning the outcomes of complaints are gathered from local governments, not all councils submit their data and no formal analysis or reporting is undertaken in a way that informs subsequent strategies to address the emerging trends. The lack of adequate information systems available to the OLG as mentioned later in this report contributes to this knowledge management gap.

Some general observations from the data gathered for 2021 are:

- About 70 per cent of complaints received were resolved by means other than preliminary assessment or investigation. In other words, they were rejected as frivolous and vexatious or resolved informally by the mayor or general manager with the councillors concerned.
- Of the complaints finalised, about 60 per cent were found not to have breached the code of conduct as alleged.
- Of the complaints submitted for investigation the types of conduct complained of were:

Part 3 – General Conduct Obligations –	55%
Part 5 – Non-pecuniary conflicts -	0%
Part 6 – Gifts and Benefits –	2%
Part 7 – Relationships with Staff –	10%
Part 8 – Access to information/resources –	15%
Parts 4 & 9 – Referred to OLG –	10%
Not Classified -	<u>3%</u>
Total	100%

The following table provides other data of interest from the past three years.

Councillor complaints statistics			
Year	2018/2019	2019/2020	2020/2021
Total complaint reports submitted to the OLG by councils (128) and county councils (9)	135	133	99
Total complaints received	328	400	346
Total complaints finalised in reporting period	268	365	322
Declined/ resolved by the general manager	67	91	67
Referred to conduct reviewer	205	148	185
Declined/ resolved by conduct reviewer at prelim stage	95	139	111
Proceed to formal investigation	205	248	185
Breach substantiated	54	47	46
Referral to the OLG*	unknown	unknown	unknown
Referred under special complaints management arrangement	13	8	18
Further action taken by the OLG	unknown	unknown	unknown
Council staff and reviewer costs	\$1,573,985	\$1,626,531	\$1,464,811

*Referrals to the OLG can occur from Part 4 and Part 9 matters, from conduct reviewers or from councils.

An observable feature about the source of complaints is that, to a large extent, they originate from elected members themselves. In other words, many of the complaints are lodged by councillors about their fellow councillors. In addition, many of the issues giving rise to complaints are of a local origin about interpersonal conflicts that should not require the commitment of significant and costly resources to resolve.

While the numbers above illustrate a considerable volume of conduct complaints facing the administrators, reviewers, investigators and decision makers involved in the complaints process, the real implications for the local governments concerned, particularly those experiencing higher than average complaint numbers, are significant in terms of cost and disruption to council business.

For the OLG, the implications involve diversion of scarce resources from otherwise higher value focus on the overall integrity and effective performance of the local government sector in delivering works and services to their communities.

Another factor likely to affect complaint statistics is that individual local governments experience volatility in the number and frequency of complaints about councillor conduct according to changes of elected personnel from one election to another. The scope of these complaints also varies in terms of seriousness. Recent statistics reveal the majority involve conduct issues that are at the lower end of the scale and relate to minor interpersonal skirmishes that should be resolved early by informal means.

2.3 Office of Local Government Action

Information available from the OLG reveals that in the period 1 April 2020 to 30 September 2021, the OLG finalised 56 misconduct complaints or referrals which did not proceed to investigation or departmental report stage. The average timeframe for finalisation of those matters was 75 days.

During the same time period, the OLG finalised 16 misconduct investigations/departmental reports resulting in 11 councillor disciplinary orders and five performance improvement orders.

The average timeframe from authorisation to finalisation for those matters was 418 days.

The average cost per public inquiry to the OLG is estimated at around \$1.5 million. No additional funding is allocated to the OLG for these and the cost of each inquiry is funded from the OLG's annual operating budget.

As well as complaints escalated to the OLG by councils and county councils, the OLG also receives complaints about councillor conduct direct from members of the public and other councillors. These can involve a wide range of allegations from minor indiscretions to serious misconduct.

Disciplinary actions, directions or orders issued by the CEO/ Executive Director of the OLG in 2021 were significantly higher than in previous years.

Disciplinary /direction Orders issued by the OLG	
Year	Number
2021	11
2020	2
2019	2
2018	2
2017	1
2016	1
2015	1
2014	0
2013	2
1012	3

The role of the OLG is not confined to councillor conduct issues referred by councils.

The OLG Investigations Team receives referrals from councils of code of conduct complaints relating to alleged pecuniary interest matters - under Part 9 of the Model Code of Conduct -concerning political donations, as well as complaints about administrators.

The Investigations Team also receives the referral of serious misconduct matters finalised by Councils conduct reviewers.

Additionally, the OLG receives complaints directly from individual councillors, general managers, members of the public and referrals from the ICAC regarding allegations of both code of conduct breaches and maladministration/ dysfunction. The OLG also has a memorandum of understanding in place with the NSW Ombudsman to enable the sharing of information and complaints management.

One reason for the volume of substantive complaint assessments and investigations directed to the OLG is the consequence of the Supreme Court decision (*Cornish v Secretary, Department of Planning, Industry and Environment* 2019). This limited to a censure the council's ability to sanction councillors found to have breached the code for minor matters. With councils' options now severely limited there has been an increase in the OLG having to deal with what may be considered minor matters. This requires the Investigations Team to undertake an assessment and provide a response to every complaint, which results in many cases suffering duplication of process.

The current procedures require councils to investigate a matter by referral initially to a conduct reviewer, affording procedural fairness, then referring the matter to the OLG for investigation under the misconduct framework. Because of the higher sanctions available, the OLG often has to re-investigate the matter to ensure the evidence obtained is admissible (In other words in applying the *Briginshaw* Principle, more convincing evidence is necessary to meet the standard of proof where the allegation is particularly serious). Procedural fairness is afforded to the subject for a second time and finally the matter may be referred to the NCAT where the matter is examined for a third time before a determination is made.

2.4 Timeframes for resolution of complaints

An ongoing criticism of the current councillor complaints framework has been the extended timeframes taken to complete the complaint processes.

No data is requested or provided by councils in their annual returns as to the length of time taken to finalise complaints or investigations, even though this was a high-level concern for most submitters.

Anecdotal evidence suggests a wide range of timeframes exists, depending on the complexity of the matter. Timeframes in excess of a year are reportedly not uncommon. The recognisable concern arising from this is that the councillor involved may continue with the conduct under complaint while the matter's examination is protracted. Conversely, the accused may remain unnecessarily under an integrity cloud until the matter is resolved.

At the NSW Parliamentary Estimates hearings in 2021, the then CEO provided the following data in response to a question about timeframes encountered with the OLG complaints procedures.³

³ Budget Estimates 2020/21 Answers to questions taken on notice 11 March 2021 p16

Year	Number of matters finalised by OLG	Timeframe to complete - median	Timeframe to complete - average
2017/18	53	100 days / 14 weeks	107 days / 15 weeks
2018/19	75	102 days / 14 weeks	136 days / 19 weeks
2019/20	96	92 days / 13 weeks	129 days / 18 weeks

The OLG Investigations Team sets triage performance standards for initial responses as follows,

- declines (28 days response),
- preliminary enquiries for more serious matter (90 days response) which may progress into investigations and interventions.

However, actual timeframes involving complaints referred to the OLG indicate that matters reviewed that do not require formal investigation, or a departmental report, still take more than two months to finalise. Where misconduct matters proceed to investigation or departmental report, timeframes in excess of a year can be expected.

Information prepared for the consultation paper stated:

*'Data collected on misconduct matters finalised by the OLG between April 2020 and September 2021 indicates that, on average, it takes the 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).'*⁴

2.5 Costs of complaint handling

Of the 100 councils and county councils who submitted a report in the 2020/2021 reporting period, the total cost of administering local complaint processes was reported to be \$1.46 million. This averages about \$30,000 per council receiving complaints, although the average is considerably affected by those councils with significant numbers of complaints. These costs include investigation costs of external conduct reviewers and estimated staff costs.

Data collected by the 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.

The impact of the Cornish case has had a further effect of increasing both the time and cost of dealing with these matters. principally because any matter warranting consideration of more than mere censure must be escalated to the OLG to deal with. Although full costing of the OLG's involvement in these matters is not available, an amount of about \$1.2 million is estimated as the annual cost of the Investigations Team.

It is not known what proportion of this cost is directly related to investigating councillor conduct complaints, as the team is also assigned to supporting public inquiries and other intervention functions. The figure also does not include the cost of using consultants or obtaining legal advice in respect of conduct investigations.

2.6 Addressing the issues

Consequently, 'the problem' in this case is really an economic question about the opportunity cost of resources and public funds – whether council or government – consumed in a process that is largely avoidable by public officials adopting a responsible, respectful and businesslike approach to their decision making and representative role. Where that approach cannot be achieved by self-discipline, an appropriate regulatory framework needs to be established to assure communities of effective civic leadership.

The emergence and persistence of high levels of complaints requiring a formal process of assessment, investigation, determination, appeal and intervention tends to indicate that the current overall regulatory framework should be the focus of holistic review. Other jurisdictions have found that concentrating on only one or two elements of the system produces sub-optimal results and often creates an imbalance in other parts of the system.

A more comprehensive approach to addressing or regulating such human issues as personal conduct requires an overall architecture as follows:

Legislate – Prescribe clear expectations and standards of conduct for public officials.

Educate – Provide awareness, training, and continuing focus on the standards.

Prevent – Remove/reduce opportunity for conduct contrary to the standards.

Devolve/enable/empower – Require accountability at the local level for behaviour at meetings.

Detect and Manage – Assess, investigate and determine allegations. Mediate minor conflicts and summarily deal with frivolous matters.

Discipline and deter – Invoke penalties for breaches commensurate with the gravity of the offence to discourage first and repeat offenders

Direct – Advise, instruct, and order to enforce accountability.

Audit – Test compliance, measure performance, assure quality of outcomes.

Intervene – Act to correct or realign actions or outcomes inconsistent with standards.

Assure equity – Enable appropriate recourse to natural justice.

These elements are embraced in the findings and recommendations of this review.

4 Councillor Conduct Accountability in NSW Local Government Consultation Paper November 2021 p.13

3. LEGISLATE

The current NSW councillor conduct accountability framework is mapped across various provisions of the Local Government Act, the Local Government Regulation and Model Codes and Procedures made under regulation. The OLG also issues guidelines and orders from time to time to which local governments are expected to adhere. The principal instrument is the Model Code of Conduct for Local Councils in NSW 2020. By its definitions, this code also applies to county councils and joint organisations.

Councils are required to adopt this Model Code of Conduct or a suitable variant not inconsistent with its core provisions. This model code combines requirements for both councillors and council employees, although there is an option for councils to adopt separate codes for councillors and employees.

In addition, the Department of Planning Industry and Environment has published a Code of Conduct for Local Planning Panels (2018) under which the management of complaints is the responsibility of the relevant council's general manager. The department also publishes the Sydney District and Regional Planning Panels Code of Conduct (August 2020), under which complaints are referred to the Panel Chair for dealing with under the Planning Panel's Complaints Handling Policy.

3.1 A single code for Councillors

Whether there needs to be a councillors' code of conduct separate from the employees' code of conduct was the subject of varied responses in submissions during the consultation period. Some pointed out that the option is already available to councils to select separate codes, although others seemed unaware of the templates available on the OLG website.

In any event, there is a question as to why the employees' code of conduct needs to be a matter for adoption by a council in the first place. The Local Government Act 1993 clearly provides for the separate roles of council officials (councillors) as members of the governing body responsible for the strategic direction of the council, and the administrative body (general manager) responsible for the overall day to day management of the council organisation.

Under current legislation, the only employee subject to direction by the council is the general manager. All other employees are subject to direction by the general manager, who is responsible for dealing with any conduct issues involving those employees and the relevant industrial legislation or Awards that apply to employees.

Accordingly, it is inappropriate for councils to direct the behaviour of ordinary employees by their own mandated code of conduct. The expectations as to the general manager's conduct may be and should be prescribed in that officer's contract of employment, with reference to appropriate legislative provisions.

The code of conduct for employees should therefore be established separately from the councillors' code, by the OLG under regulation or order for application by the general manager in their role as head of the organisation.

3.2 Alignment with planning panels and other representative bodies

The councillors' code of conduct should be all encompassing of any forum in which the councillor participates as a function of their office as an elected member. In other words, the same code should apply regardless of whether the councillor is acting in their role in a council meeting or council committee meeting; a councillor workshop or information briefing; receiving a deputation, attending an Audit Risk and Improvement Committee meeting, or a meeting of an Advisory Committee of which they are a member or an observer; a Planning Panel or any forum or another body or agency on which the councillor performs a representative role for the council. This should also extend to events and functions the councillor attends in an official capacity.

Accordingly, there should be no need for separate codes for councillors attending these other bodies, and any matters of conduct occurring at those forums should fall within the jurisdiction of the single councillor code of conduct. Any complaints arising from those forums should therefore be dealt with uniformly under the general councillor conduct accountability framework described later in this report.

Interstate comparison

A survey of other jurisdictions indicates a variety of approaches to the scope and range of issues covered in councillor codes of conduct. However, in those states where mandatory/model codes exist, they tend to have separate codes for councillors. Information in the Sansom report reveals:

'NT, Qld, Tas and WA all have mandatory/model codes that cover similar issues to those in the NSW Code, but they are limited to elected members (and in some cases external members of committees/subsidiaries) and much briefer. As in NSW, councils are free to adopt their own codes with additional or only slightly amended material, and in some cases they are required to develop supplementary policies (eg. for gifts and benefits in NT and for meeting procedures and councillor-staff interactions in Victoria. In SA and Vic there is no standard code as such, only legislated standards of behaviour/conduct that councils must use as a basis for developing their own codes/policies.'

*To varying degrees jurisdictions include systemic procedures and specified offences (as opposed to less serious misconduct) in the Act rather than the Code, with scope for additional detail to be added through state guidelines and/or council's own policies.'*⁵

At present, the NSW Local Government Act 1993 does not contain the behavioural standards expected of councillors, as some other jurisdictions do. Section 440AAA of the Act merely mentions topics that might be included in codes of conduct but does not set the standards.

There may be advantage in enshrining those standards in the parent act rather than leaving their specification to the code so that they are recognised as a statutory obligation.

5 Sansom P3

3.4 A new Councillors Code of Conduct

A new councillors' code of conduct should be promulgated by the OLG fully focused on their context as elected members, encompassing every forum in which a councillor performs a representative role. The councillors' code of conduct needs to be comprehensive in prescribing the expectations of councillor conduct in alignment with the fundamental principles applicable to their holding of public office. The current code is deficient in not providing this foundation in its preamble, which should clearly link the code to the guiding principles for councils contained in Section 8A of the *Local Government Act 1993* and the councillors' Declaration of Office.

It is considered useful to recite those principles here:

LOCAL GOVERNMENT PRINCIPLES

Section 8A of the Local Government Act provides **8A Guiding principles for councils**

(1) **Exercise of functions generally** The following general principles apply to the exercise of functions by councils—

- (a) Councils should provide strong and effective representation, leadership, planning and decision-making.
- (b) Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.
- (c) Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
- (d) Councils should apply the integrated planning and reporting framework in carrying out their functions so as to achieve desired outcomes and continuous improvements.
- (e) Councils should work co-operatively with other councils and the state government to achieve desired outcomes for the local community.
- (f) Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
- (g) Councils should work with others to secure appropriate services for local community needs.
- (h) Councils should act fairly, ethically and without bias in the interests of the local community.
- (i) Councils should be responsible employers and provide a consultative and supportive working environment for staff.

(2) **Decision-making** The following principles apply to decision-making by councils (subject to any other applicable law)—

- (a) Councils should recognise diverse local community needs and interests.
- (b) Councils should consider social justice principles.
- (c) Councils should consider the long term and cumulative effects of actions on future generations.
- (d) Councils should consider the principles of ecologically sustainable development.

(e) Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

(3) Community participation

Councils should actively engage with their local communities, through the use of the integrated planning and reporting framework and other measures.”

The importance of linking the code to the Declaration of Office is emphasised by the fact that Section 233A of the Local Government Act provides that:

‘a councillor must take an oath of office or make an affirmation of office at or before the first meeting of the council after the councillor is elected’.

To have the code of conduct included as a reference in the oath/affirmation generally as follows would reinforce the councillor's obligations.

Affirmation - ‘I [name of councillor] solemnly and sincerely declare and affirm that I will undertake the duties of the office of councillor in the best interests of the people of [name of council area] and the [name of council], and that I will faithfully and impartially carry out the functions, powers, authorities and discretions vested in me under the *Local Government Act 1993* or any other act to the best of my ability and judgment,’ and that I will faithfully observe the Councillors code of conduct as it applies to my office.

A number of submitters raised concerns about what they perceived to be lack of sufficient clarity in the code's definition of circumstances representing breaches of the code and inadequate description of related penalties. In comparison to systems in other jurisdictions, the NSW Code is lacking a clear classification of conduct hierarchies and their attendant recourses.

The current form of the code should also be reviewed to encompass these and other reforms canvassed in later sections of this report.

3.5 Extended application of the code

An issue raised in the submissions concerned the prospect of extending the application of the councillors code of conduct to other office holders who exercise representative responsibilities similar to that of councillors, but not bound by the same legislative duties, or to appointed officials who convene in the same forum as elected members. Typically, these classes of officials would include members of a council's Audit, Risk and Improvement Committee, Advisory Committee or other representative body.

The review consultation paper pointed out that the code of conduct:

‘automatically applies to all councillors, council staff and others who exercise council functions under delegation for 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.’¹⁶

Under the new administrative framework proposed in Section 7 of this report, the procedures for reporting and dealing with breaches of the code by these other officials such as Audit, Risk and Improvement Committee and Advisory Committee members could be consistent with breaches by councillors, with the proposed Independent Councillor Conduct Review Panel handling these matters as well. However, there may be a need to establish a slightly different range of sanctions and penalties to deal with non-councillor members of such bodies, including dismissal from the committee or representative body for serious conduct breaches.

Separating the councillor and employee codes would also enable better differentiation between the circumstances of the extended class of volunteers and contractors who should be placed under the employees' code rather than the councillor code, with their adherence to the code supervised by the general manager rather than the Independent Councillor Conduct Review Panel.

3.6 Standards and prescription in the code

Submissions received during the consultation period canvassed a number of options for improving the manner in which the current code establishes the behavioural standards for councillors. There were some differences of opinion as to the target areas for this improvement, and in relation to the extent of additional requirements.

Of most interest to submitters was the improvement of clarity and avoidance of ambiguity and uncertainty in defining the required standards of conduct. This would make it more apparent when conduct breached those standards and what sanctions would be appropriate to apply.

Linking those standards to fundamental principles of good conduct and reasonable expectations of holders of public office is seen as the key starting point.

Clarity and uncertainty should be addressed in the following ways:

Part 3 – General conduct

Definitions contained in the code should not only be expressed in unambiguous and clear language but should also be aligned to the definition used for the same or similar terms in other legislation. For example, the terms 'bullying', 'harassment' and 'discrimination' used in the councillors' code of conduct should be consistent with those terms as they are used in the legislation specifically focused on those matters. In fact, rather than stating definitions for these terms in the code, it might simply 'call up' the original definitions from the other legislation by reference, for example, 'As defined in the *Anti-Discrimination Act 2011*', so that any changes to the original legislation do not require monitoring to update the code.

To help with interpreting its provisions (for the same reason of avoiding ambiguity and uncertainty), the code should provide examples and explanatory notes as to its plain meaning and application particularly in 'grey areas'.

A particular area requiring clarification is that of the intersection of the code of conduct with requirements of workplace health and safety legislation and the general duty of care obligations of councillors, as well as management, to ensure a safe workplace free from the harm caused by

bullying, and harassing, discriminatory and threatening conduct. The council chamber is as much a workplace as the general office and those working in that space are entitled to protection from harm. Those acting in a way likely to cause that harm should be sanctioned under the code, or other relevant legislation as appropriate.

The code should also be clear about how matters that represent both breaches of the code and breaches of other legislation should be dealt with.

Clarity is also important around the appropriate approach to conduct within the normal and acceptable bounds of robust debate that is part of the local government deliberative process. Strongly asserting one's case for or against a matter before the council does not of itself constitute improper conduct, provided the assertion is respectfully presented and focuses on the merits of the argument not on the personal attributes of the protagonists. The code previously contained terms associated with conduct that is 'respectful' and 'tolerant' of other views. A number of submissions commented on this. Consideration might be given to restoring these as desirable values within the councillors' code of conduct. In this respect in particular, the provision of examples and illustrations would be desirable inclusions in the code.

A number of submissions also mentioned the emergence of conduct issues related to social media. The rapid expansion and adoption of this feature of modern society has to some degree overtaken the traditional scope of codes of conduct and presents a new and challenging development. Originating as a vehicle for social interaction, it has been appropriated as a political tool along with its attendant risks to both privacy and personal security. Although some councils have formulated policies aimed at regulating the social media behaviour of councillors, and the OLG has issued model policies and guidelines, there is clearly a need for the code to include specific reference to this new influence on councillor conduct.

Issues were raised about clarifying the obligation of councillors to observe the code of conduct in all public forums, not just Council meetings. A councillor's duty extends to appearing at business and community events 'in their capacity as councillor', not necessarily representing the Council. Inappropriate conduct in these settings can breach the expectations of the code and there should be greater clarity around to what extent poor behaviour in that context is actionable. Once again, examples and explanatory notes should provide advice in this respect.

The current code's provisions concerning fairness and equity are very general and would benefit from further development and informative examples and explanatory notes. The issue of lobbying should also be addressed, perhaps informed by the findings and recommendations of the recent ICAC inquiry (Operation Eclipse).

It is recognised that suggestions about examples and explanatory notes are reliant on the OLG gathering information about breaches and how they are dealt with, in order to have a knowledge base from which to provide this advice. That capacity is discussed later in the report.

Part 4, 5 and 6 – Pecuniary interest/non-pecuniary conflicts of interest/personal benefit

A number of submissions suggested the code of conduct provisions concerning pecuniary interest, significant and non-pecuniary conflicts of interest and personal benefit need to be clarified and, in some cases, extended or strengthened. A number of submitters comments indicated that their comprehension of the provisions, and especially the differentiation between the types/classes of breaches, was not high.

The current code contains a great deal of detail describing these interests and methods of declaration. However, from the experience of some of the submitters, there is still considerable ambiguity and uncertainty (for councillors) in interpreting the application of the code to particular circumstances. There is also a view that some of the language used in the code permits avoidance of obligations through emphasising terms such as ‘*a reasonable likelihood or expectation of appreciable financial gain or loss*’. It is said that this modifier enables circumvention of the intent of the provision.

Other comments from submitters about uncertainty related to the process around declaration of interests and the presence of a councillor with a perceived pecuniary or conflict of interest at meetings of Council, including committees, workshops or briefings. Further clarification by examples would be useful.

In addition, recent public inquiries into councils and ICAC Operations have given rise to a number of recommendations about matters deemed to require amendment to legislation or the Model Code of Conduct to address councillor conduct issues, including deliberate failures to declare conflicts of interest. Those recommendations deserve to be considered by the NSW Government in their own context and are not evaluated here.

However, they are commended for consideration where they intersect with or reinforce the findings of this review. A summary of the outcomes of those inquiries and operations is set out in **Attachment E** to this report.

3.7 Classifying conduct

One of the most commented on aspects during the consultation process was the perceived need to clarify the various classes of conduct that might represent breaches of the code of conduct and the manner in which each class should be dealt with. The current code of conduct should be improved by a clearer statement in this respect.

The main classes of conduct which raise issues of possible breach of legislation and the Code can be seen as:

- **Type 1: Disorderly meeting conduct** – behaviour in a meeting that is contrary to the provisions of the code of meeting practice, disrespectful to the meeting chair, other councillors, council officers and members of the public attending, or disruptive to the orderly progress of business before the council.
- **Type 2(a): Misconduct** – behaviour that is contrary to the general conduct obligations of councillors as set out in Part 3 of the current code of conduct.
- **Type 2(b): Serious misconduct** – behaviour that is contrary to the conduct standards set out in Part 5, 6, 7 and 8 of the current code of conduct (excluding certain issues that should more properly be classed as integrity breaches.
- **Type 3: Integrity offences** – behaviour that is contrary to or fails to observe required standards for declaring pecuniary interests, political donations, significant non-pecuniary conflicts of interest, code integrity, as generally set out in Parts 4,5 and 9 of the current code of conduct, or involves repeated serious misconduct.
- **Type 4: Corrupt conduct** – behaviour defined in the relevant Independent Commission Against Corruption (ICAC) legislation that falls within that body’s jurisdiction.

The code needs to be revised to more clearly define these classes and the procedures for administering the code of conduct revised to more clearly define the manner in which each class should be dealt with.

The detail of this codification and its link to the processes of managing complaints is discussed in detail later in this report. For the purposes of this section, it is sufficient to conclude that the new councillors’ code of conduct should incorporate a schedule of councillor conduct standards and jurisdictional enforcement options referred to in Section 8.1 of this report.

RECOMMENDATIONS

- I. That a statement of behavioural standards for councillors be included in the Local Government Act to provide greater statutory obligation for their observance.
- II. That a new code of conduct for councillors be developed fully separate from the employees code and focused on the specific context of elected members.
- III. That the new code establish clear alignment with the guiding principles for councils contained in Section 8A of the Local Government Act 1993, the proposed behavioural standards referred to in recommendation I, and with the councillors oath and affirmation of office.
- IV. That the new code:
 - a) apply to every forum in which councillors participate in their capacity as an elected member of the local government including Planning Panels, Audit Risk and Improvement Committees, Advisory Committees as well as workshops briefing sessions and the like.
 - b) incorporate a schedule of councillor conduct standards and jurisdictional enforcement options as described in Section 8.1, clearly defining the behaviours that represent breaches of the code of conduct according to relevant classes, together with the associated sanctions and penalties applicable to those breaches.
 - c) address any other deficiencies of uncertainty and ambiguity identified elsewhere in this report.
- V. That the councillors oath and affirmation of office prescribed in Section 233A of the Local Government Act 1993, be amended to make specific reference to faithful observance of the councillors code of conduct. (**See Attachment C**)
- VI. That serious breaches of the code of conduct be treated as breaches of the councillor’s oath and affirmation of office.
- VII. That Section 233A of the Local Government Act 1993 be amended to clearly state the consequences of a councillor breaching the oath or affirmation of office.

4. EDUCATE

A high proportion of submissions made to the review supported mandatory training for councillors and a number suggested that the current arrangements made it too easy for councillors to avoid the commitment. There was also commentary about perceived deficiencies in content and training standards, as well as views that topics such as inter-personal relations should be given more emphasis. Follow up testing for understanding was also suggested.

Mandatory induction, as well as continuing development, was favoured by a number and some were of the view that penalties, such as suspension from meeting attendance, should apply to councillors who did not complete the induction training.

There were views about providing more consistency in delivery through qualified and accredited trainers and program content designed and/or supervised by the OLG.

One of the long-held values of local government is that its elected representatives tend to be drawn from the 'grass roots' of communities and reflect the ordinary citizenry of the region. A downside of this attribute is that when first entering the role of councillor, many newly elected representatives are unaware or at least unprepared for the full scope of responsibilities and obligations to which they must immediately adjust. It is not just the legislative and technical issues they are expected to comprehend in their decision-making role. It is also the inter-personal dynamics of an often-intense forum of policy debate and the pressures of balancing the public interest against private aspirations and election campaign platforms.

History indicates the majority of newly elected members learn well 'on the job'. However, the transition – especially in regions facing growth pressures and the emergence of highly competitive politics – can be difficult and sometimes disruptive to the orderly conduct of business for the local government.

4.1 Preparation for local government office

To be successful as a local government councillor, it is vitally important individuals are aware of and accept the serious obligations they are about to undertake by nominating for election. They also need to be prepared to participate in a decision-making forum that requires the same or greater diligence and integrity expected of a corporate director.

In the context of this review, that awareness and preparation should also extend to the community's expectations of the values, conduct and behaviour to be exhibited by councillors once elected to office.

While some informational material is available to prospective candidates through the OLG, there is currently no obligation on candidates to undertake any focused preparation by seeking to understand the role of a councillor or mayor and the legislative responsibilities and obligations required of them once elected to office.

4.2 The Queensland model

In recognition of the importance of candidates for election being prepared for their obligations as councillors, the Queensland Government has introduced a mandatory candidates' training program that presents aspiring councillors with a range of essential information necessary for their effective transition. To ensure candidates undertake this preparation, it is mandated by legislation as a condition of nomination for election under the Local Government Electoral Act.

'Section 26 - Who may be nominated

...

(2) Also, a person may be nominated as a candidate for an election only if the person has, within 6 months before the nomination day for the election, successfully completed a training course approved by the department's chief executive about—

(a) the person's obligations as a candidate, including the person's obligations under part 6 [Electoral funding and financial disclosure]; and

(b) the person's obligations as a councillor, if the person is elected or appointed, including obligations under a Local Government Act within the meaning of the Local Government Act 2009.¹⁷

The election nomination form requires confirmation of the training as a condition of the nomination form being considered formal.

'Schedule 1 Clause 7 - Training course approved under Act, s 26

The nomination must contain a statement that the candidate has, within 6 months before the nomination day for the election, successfully completed a training course approved under section 26(2) of the Act.¹⁸

The training is provided by the Queensland Department of Local Government as an online resource. It enables validation of the learning outcomes through question prompts and, on successful completion, provides a certificate to that effect. The content of the training material includes reference to councillors' obligations under the code of conduct.

Similar requirements introduced in NSW would ensure that newly elected councillors would be aware of their obligations before taking up office. The preparatory training is not intended to replace the more detailed induction training provided after their election but eliminates any misconceptions that becoming a councillor is not accompanied by serious commitments to integrity, transparency and the public interest.

7 Queensland Local Government Elections Act 2011
8 Ibid.

4.3 Councillor training

Part 8A of the NSW Local Government Regulation 2021 makes provision for induction training for newly elected councillors, refresher training for re-elected councillors and ongoing professional development of councillors and mayors. While the current provisions make it mandatory for the council's general manager to ensure that training courses are delivered to both councillors and Mayors, the regulation is not specific as to the content of the course, other than providing *'information about the functions and obligations of councils and councillors and the administrative procedures and operations of the council'* (Reg 183(2)) and as for refresher training *'having regard to the specific skills required by the mayor, each individual councillor and the governing body of the council as a whole to perform the role of mayor, councillor or the governing body (as the case may be)'* (Reg 185 (3)(b)).

Regulation 184(2) provides for the general manager to deliver special supplemental training to the mayor, which *'must provide the mayor with information about the functions and obligations of councils and mayors and train the mayor in the skills necessary to perform the role of mayor.'*⁹

Consequently, each general manager may determine the curriculum and focus of these courses and has the discretion to present or engage others to present the material. This can lead to variation in both the content and effectiveness of delivery across local governments.

The OLG provides training services for induction of councillors and mayors. No data is available as to how widely that service is provided or the effectiveness of its presentation. For the first time this year, the OLG offered online courses to all councillors and staff – registration was free. Anecdotal evidence suggests these were well attended.

Lack of uniformity in the formulation and presentation of councillor training courses means that necessary knowledge and understanding of obligations concerning councillor conduct may vary considerably between councils.

The Regulation also requires councils to publish in their annual report details of the names of mayors and councillors who participated in induction courses, refresher courses or professional development courses during the year.

While the Regulation states that the general manager *'must ensure that [training] is delivered to each councillor'*, the Regulation merely states that the elected members *'must make all reasonable efforts to participate'*. Consequently, this creates incongruity in that the general manager cannot achieve delivery if a councillor declines to attend.

The prescribed timing of induction training *'within 6 months of the councillor's election'* (Reg 183(1)) also raises issues of untrained or unprepared councillors participating in formal decision-making on significant issues for some months before completing their induction. While in practice, diligent general managers will tend to arrange the relevant training as soon as possible, the permitted window creates some level of risk.

A number of submissions made to the review indicate that not all elected members take seriously the Regulation's exhortation to make all reasonable efforts to participate. As participation is not mandatory, and nor are there any incentives or sanctions encouraging councillors to participate, it is possible for individual councillors to avoid exposure to key information about their obligations and the processes involved in councillor conduct accountability.

4.4 Induction

It is considered essential, if councillors are to be able to carry out their statutory roles effectively, for them to be well versed in their duties and obligations and in the environment in which elected members operate. Obviously, the induction program for newly elected members, especially first time councillors, is a critical introduction to their role and their participation should be made mandatory. This also means that the content of the induction program must be suitable and consistent across local governments. To that end, its structure and topic selection should be prescribed by Ministerial Order or Regulation to establish its authority. The mandatory timeframe for completion of induction training should also be revised.

Councillors participate in decision-making that may involve committing millions of dollars of public funds or prejudicing the rights of individuals or communities. To do so without being adequately prepared or knowledgeable of their obligations in that process is an act of negligence.

The content of this training should be targeted at not just the broad functions of local government and the statutory summary of a councillor's responsibilities, but the core skills required of elected members to effectively participate in the decision making of the council.

For example, an important responsibility of the mayor and deputy mayor is the regular performance review of the general manager. Such an undertaking should not be embarked on unprepared. Although there are guidelines that encourage training to be obtained there is no mandate and no consequences for performing reviews untrained.

The curriculum for all forms of training should be uniform across councils and provided by accredited trainers.

Ideally consideration should be given to requiring newly elected councillors, whether first time or returning, to complete a mandatory induction program before being permitted to participate in the formal business of the council. Recognising this may not always be possible there should at least be a shorter timeframe of three months for mandatory completion, following which attendance at meetings should be suspended until the induction training is completed.

4.5 Continuing development

Regulation 185 recognises the importance of continuing development of councillor capability by requiring the general manager to ensure this type of training is delivered to mayors and councillors, based on a training needs assessment conducted in consultation with each councillor concerned. However, as with induction and refresher training, the Regulation only requires elected members to make all reasonable efforts to participate.

To ensure this capability is maintained on an ongoing basis, regular participation in nominated training and awareness courses should also be made mandatory. These nominated courses, which should be held at least annually, would typically focus on legislative changes, good governance issues, and refreshers on code of conduct and financial management.

Making participation in training mandatory also needs to be accompanied by appropriate incentives to encourage participation or sanctions for non-compliance. A system of industry accreditation would be helpful in this respect. Course completion accreditation provides public recognition and acknowledgement of the councillor's diligence in developing their capabilities as an effective elected member.

Conversely, to ensure councillors are confronted with their obligations, failure to attend mandatory training courses should be subject to appropriate sanctions preventing the councillor participating in decision forums where the lack of understanding of those obligations would be detrimental to effective decision-making.

Recognising the view of the court in relation to 'denial of representation', the issue of preventing councillors acting in their elected capacity for failing to complete mandatory training may need deeper consideration. However, appropriate disincentives should be applied to ensure that councillors maintain awareness and knowledge of their obligations and acquire adequate skills to fulfil their role effectively.

In the same way that company directors are expected to prepare themselves and continue to develop their skills to undertake their fiduciary obligations, councillors should be obliged to maintain a similarly high level of acumen in understanding the legislative and business environment in which they are required to be decision-makers.

In some jurisdictions, strategic partnerships have been made between local government and the Australian Institute of Company Directors to provide bespoke development courses oriented specifically to the local government context. Many local governments encourage their elected members to undertake the formal AICD Company Directors Course as a means of developing their approach to good governance.

Some local governments also establish partnerships with universities and professional associations such as the Australian Institute of Management to deliver developmental programs for councillors. In some states, the relevant Local Government Association plays a key part in designing, accrediting and/or delivering councillor-oriented development programs.

Comparative interstate research indicates that while the sector in all jurisdictions believe councillor training is very important and there should be more of it, there is little in the way of useful models for this review.

Some state agencies and LGAs provide elements of necessary content, as do some higher education institutes and universities but generally this is ad hoc and lacking coherence.

Councils may be required to produce training plans, but finding suitable programs is a challenge and they tend to be offered by diverse competing suppliers. It is not unusual for the NSW position on "mandatory" training not being enforced to be replicated elsewhere.

RECOMMENDATIONS:

VIII. That mandatory pre-nomination training be introduced for all candidates as a pre-condition of nominating for local government elections and appropriate amendment to the NSW Electoral Act 2017 be sought for this purpose.

IX. That the OLG in consultation with LGNSW and appropriate Sector stakeholders be tasked with developing the pre-nomination training course to be offered online using the Queensland model for guidance.

X. That attendance at councillor induction courses be made mandatory and completion of the required training within three months of election be made a precondition of newly elected councillors whether freshly elected or returning, participating in council meetings.

XI. That mandatory supplementary training for mayors be required to include specific training on:

a. conducting meetings and the code of meeting practice, including managing disorderly meeting behaviour.

b. conducting performance reviews involving the council's general manager.

XII. That a uniform program for continuing professional development and refresher training for councillors and mayors be developed nominating mandatory content requiring attendance of councillors.

XIII. That all training content for mandatory councillor training topics be developed in consultation with LGNSW and appropriate Sector stakeholders and be required to be delivered by trainers accredited in those topics.

XIV. That appropriate sanctions or penalties be imposed for non-attendance by councillors at mandatory councillor training courses.

5. PREVENT

The most effective way to reduce the number, severity, time consumption and cost of councillor conduct complaint handling is to prevent the occurrence of the poor conduct in the first place. Most conduct management systems are predicated on detection and response rather than prevention, but the latter is well recognised as a key strategy in all behavioural scenarios.

So, in the case of councillor conduct, consideration needs to be given to prevention strategies.

This report has already addressed two important elements of such a strategy:

- a) make clear laws about conduct expectations and remove any ambiguity about the meaning.
- b) educate councillors about the expectations and alert them to the consequences of non-compliance.

Additional strategies need to be focused on the following principals:

Complete transparency – Only when all actions and motivations are fully disclosed and apparent to all observers can there be any assurance of conduct integrity. Secrecy and closed doors breed deception and encourage misconduct.

Transparency means:

- full disclosure of all possible conflicts of interest, both in Registers and at all meetings, including workshops and briefings
- eliminating as far as possible meetings that are closed to the public or are not audio-visually recorded or webcast
- open debate of issues without caucusing or pre-arranged agreement on outcomes.

A recent key initiative announced by the Minister of Local Government is the intention of the OLG to conduct random audits of councillors and officers' registers of interest to establish compliance. To help councillors maintain their transparency in this respect, councils should adopt the practice of having declaration forms included in all meeting agendas (including workshops and briefings) to prompt councillors to disclose any conflicts readily and in writing.

Avoidance of risk – Placing councillors in environments or circumstances that create risk or temptation to stray from the good conduct path is tempting fate. For example, in a forum where a councillor has a duty to decide planning applications and where it is possible an application may involve persons known to them, the allure to find an excuse not to declare or remove oneself from the process can be intense. In addition, councillors can be placed under coercive pressure by their peers or others by attending a forum where they might be expected to vote other than their conscience dictates.

With the release of OLG guidelines concerning lobbying resulting from the ICAC Operation Eclipse, councils should also be required to maintain public registers of officials who have interacted with lobbyists or otherwise been lobbied.

Strategies should be employed to remove councillors from any situations or obligations to participate in processes where the risks of conflict of interest or opportunity to act other

than with integrity exists. Councillors should be able to make their own good choices in that regard but if that is a problem then they might need to be advised or directed accordingly. For example, councillors whose constituency or majority of electoral support might be seen as a 'special interest group' should be offered mentoring on how to be seen as exercising impartial decision-making, consistent with s232 of the Local Government Act which requires councillors to represent the collective interests of residents, ratepayers and the local community.

The submission from ICAC to the review identified a number of areas where greater transparency should apply, such as requiring councillors to disclose conflicts of interest even in informal meetings, and absent themselves from all activity associated with the matter to avoid being seen as lobbying other councillors. In a related sense, the whole question of maintaining Registers of Interest is worthy of comprehensive review. For example, under current rules a councillor may participate in council decision making meetings for three months before being required to submit their annual disclosure of interest return.

Another area of risk mentioned in submissions related to councillors circumventing or ignoring the formal lines of authority for contacting operational staff of the council. Recognising that some frustrations can arise where a general manager employs an unduly restrictive policy of councillors communicating with staff, the new code of conduct or related guidelines might provide advice on how to navigate those arrangements without exposing councillors to action under the code.

Councillors often find themselves challenged when it comes to creating and safely keeping public records. Council organisations need to have clear guidelines for handling documents and communications that come before councillors to ensure elected members observe the State Records Act 1998 requirements and avoid inadvertent code breaches in this respect.

A clear risk area is where councillors interact with members of the public during meetings. This can occur at any meeting where a gallery is present and is even more likely where the council incorporates a public forum session within the council business agenda. This only invites disorder where controversial issues are aired and makes it more difficult for the mayor/meeting chair to control. The other risk is that, in the fervour of the moment the council moves to a formal resolution on a matter without due preparation, advice and deliberation. Current guidelines recommend separating the public forum session from the formal business agenda and there are grounds to suggest that this should be made mandatory.

In summary, the following areas of risk might be considered in conjunction with the comprehensive review of the Code of Conduct mentioned above.

- More clearly define close associates and relationships likely to affect impartial decision making – models are available from other jurisdictions.
- Define circumstances where contact with developers and/or Lobbyists is inappropriate or prohibited.
- Develop guidelines for interaction with lobbyists.
- Define and prohibit actions that represent undue influence on decisions (even though a councillor may be absent from the meeting where the matter is determined).
- Require declarations of interest even in informal settings such as workshops and briefings where matters associated with business coming before the council is discussed.
- Require all declarations of interest to be submitted in writing and have formats available at meetings to assist councillors comply, recognising that participating in video/web meetings may require electronic lodgement of the form.
- Review the timeframe for lodgement of an initial councillors register of interest following election.
- Provide a mandatory model code for councillor/ staff interactions and review any aspects of the code that might assist in ensuring reasonableness of the arrangements for all parties.
- Mandate that public forum sessions be separated from formal business agendas for council and committee meetings.
- Clarify obligations of councillors in relation to access to information and maintaining public records.
- Review any aspects of the provisions safeguarding the Integrity of the Code that are likely to cause unintended consequences of prejudicing transparency and accountability in relation to conflicts of interest.

RECOMMENDATIONS

XV. That all meetings of councillors even if closed to the public for legitimate confidentiality reasons be audio visually recorded for transparency and accountability.

XVI. That all meetings of councillors including workshops and briefings require written declarations and recordings of conflicts of interest.

XVII. That as well as addressing the matters mentioned elsewhere in this report concerning review of the code of conduct, attention be given to addressing the transparency and risk issues mentioned in Section 5.

6. DEVOLVE/EMPOWER

Many issues giving rise to complaints about councillor conduct occur as a result of the interaction of councillors in meetings, whether formal council meetings, committee meetings or other informal councillor forums. Typically, this is generated by behaviour unbecoming of elected officials and certainly below the expectations of the general public and community as to how councillors should conduct themselves. In many cases, behaviour exhibited in this way in any of the forum types could be seen as contrary to the principles set out in section 8 of the Local Government Act. These principles are intended to guide councillors in how they perform their duties.

Submissions received during the consultation period gave numerous examples of behaviour in council meetings (whether formal or informal) that, if proven, would constitute a breach of the very principles set out in the NSW Local Government Act.

6.1 Behavioural standards in meetings

The current model code of conduct for councillors prescribes certain behavioural standards expected of councillors in meetings:

'Obligations in relation to meetings

3.19 You must comply with rulings by the chair at council and committee meetings or other proceedings of the council unless a motion dissenting from the ruling is passed.

3.20 You must not engage in bullying behaviour (as defined under this Part) towards the chair, other council officials or any members of the public present during council or committee meetings or other proceedings of the council (such as, but not limited to, workshops and briefing sessions).

3.21 You must not engage in conduct that disrupts council or committee meetings or other proceedings of the council (such as, but not limited to, workshops and briefing sessions), or that would otherwise be inconsistent with the orderly conduct of meetings.

3.22 If you are a councillor, you must not engage in any acts of disorder or other conduct that is intended to prevent the proper or effective functioning of the council, or of a committee of the council.

Without limiting this clause, you must not:

- a) leave a meeting of the council or a committee for the purposes of depriving the meeting of a quorum, or*
- b) submit a rescission motion with respect to a decision for the purposes of voting against it to prevent another councillor from submitting a rescission motion with respect to the same decision, or*
- c) deliberately seek to impede the consideration of business at a meeting.¹⁰*

6.2 Complaints about meeting conduct

Many complaints received by councils and the OLG relate to behaviour at meetings.

Data from the OLG does not indicate what proportion of complaints relate to conduct of councillors in meetings. However, it is thought to be a significant source of complaint.

Data from the same source indicates that more than 90 per cent of OLG's complaints relate to matters that do not justify submitting to a formal investigation. There is a strong case that much of the councillor conduct complaint process can be dealt with at its source in council meetings.

While it is necessary to differentiate between mere misbehaviour in a meeting and behaviour that more substantially breaches the code of conduct, the prospect that a bulk of formal councillor conduct complaints might be summarily dealt with at the meeting in question, should be attractive, on the grounds of both cost-saving and the efficiency of local determination.

The foundation of this efficiency is an effective and empowering code of meeting practice.

The current Model Code of Meeting Practice for Local Councils in NSW 2021 establishes the following principles:¹¹

Principles of Meeting Practice

'2.1 Council and committee meetings should be:

Transparent: *Decisions are made in a way that is open and accountable.*

Informed: *Decisions are made based on relevant, quality information.*

Inclusive: *Decisions respect the diverse needs and interests of the local community.*

Principled: *Decisions are informed by the principles prescribed under Chapter 3 of the Act.*

Trusted: *The community has confidence that councillors and staff act ethically and make decisions in the interests of the whole community.*

Respectful: *Councillors, staff and meeting attendees treat each other with respect.*

Effective: *Meetings are well organised, effectively run and skilfully chaired.*

Orderly: *Councillors, staff and meeting attendees behave in a way that contributes to the orderly conduct of the meeting.'*

A council may adopt the Model Code of Meeting Practice as prescribed or a modified version provided – 'A code adopted or amended by the council must not contain provisions that are inconsistent with the mandatory provisions.'¹²

Given that the Model Code of Conduct declares its behavioural standards to be applicable not just to council and committee meetings but to 'other proceedings of the council (such as, but not limited to, workshops and briefing sessions)', consideration might be given to including managing those behavioural standards in workshops and briefing sessions.

10 Model Code of Conduct for local councils in NSW2020, P13

11 Model Code of Meeting Practice 2020, P7

12 Local Government Act 1993 Section 360(4)

This would be achieved by appropriate amendment of the Model Code of Meeting Practice, with necessary adaptations to exclude any provisions around procedures for debate and decision-making that do not apply to those meeting forms.

6.3 Acts of disorder

The Model Code of Meeting procedure does empower the chair to maintain order by a limited means. The model calls up the list of acts of disorder contained in Section 182 of the Local Government Regulation 2021:

LG Regulation 2021 - Section 182 Acts of disorder

‘For the purposes of section 490A of the Act, a councillor commits an act of disorder if the councillor, at a meeting of a council or a committee of a council—

(a) contravenes the Act, this Regulation or any provision of the code of meeting practice adopted by the council under section 360(3) of the Act, including any provisions incorporated in the adopted code that are prescribed by this Regulation as mandatory provisions of the model code of meeting practice, or

(b) assaults or threatens to assault another councillor or person present at the meeting, or

(c) moves or attempts to move a motion or an amendment that has an unlawful purpose or that deals with a matter that is outside the jurisdiction of the council or committee, or addresses or attempts to address the council or committee on such a motion, amendment or matter, or

(d) insults, makes unfavourable personal remarks about, or imputes improper motives to, any other councillor or a member of staff or delegate of a council, or

(e) says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or committee into contempt.’

And reflecting Section 233 of the Regulation, the Model Code of Meeting Practice empowers the chair to apply certain sanctions as follows:

‘LG Regulation 2021 - Section 233 Expulsion for acts of disorder

(1) The chairperson may require a councillor—

(a) to apologise without reservation for an act of disorder referred to in section 182(a), (b) or (e), or

(b) to withdraw a motion or an amendment referred to in section 182(c) and, where appropriate, to apologise without reservation, or

(c) to retract and apologise without reservation for any statement that constitutes an act of disorder referred to in section 182(d) or (e).

(2) A councillor may, as provided by section 10(2)(a) or (b) of the Act, be expelled from a meeting of a council for having failed to comply with a requirement under subsection (1). The expulsion of a councillor from the meeting for that reason does not prevent any other action from being taken against the councillor for the act of disorder concerned.

(3) A person (other than a councillor) may, as provided by section 10(2)(a) or (b) of the Act, be expelled from a meeting of a council for having engaged in disorderly conduct at the meeting.’

However, currently, the power of the chair to expel a councillor from a meeting is limited by Section 10 of the *Local Government Act 1993*. A councillor can only be expelled on resolution of the council. If a councillor guilty of disorder has the support of the majority of the other councillors, the latter can prevent that councillor’s expulsion, despite the disorderly behaviour.

Councils may provide a form of delegation to chairs by way of resolution to empower chairs generally to expel disorderly councillors.

Local Government Act 1993

Section 10 Who is entitled to attend meetings?

‘(1) Except as provided by this Part—

(a) everyone is entitled to attend a meeting of the council and those of its committees of which all the members are councillors, and

(b) a council must ensure that all meetings of the council and of such committees are open to the public.

(2) However, a person (whether a councillor or another person) is not entitled to be present at a meeting of the council or of such a committee if expelled from the meeting—

by a resolution of the meeting, or

by the person presiding at the meeting if the council has, by resolution, authorised the person presiding to exercise the power of expulsion.

(3) A person may be expelled from a meeting only on the grounds specified in, or in the circumstances prescribed by, the regulations.’

The Model Code of Meeting Practice needs to provide power for the chair to maintain order and the dignity of the meeting. Chairs need to be given both the responsibility and obligation in this respect. (in other words, to deal summarily with acts of disorder as defined under Section 182 of the Regulation where they occur in Council meetings, without requiring a resolution of council.)

The recourse available to the chair under Section 233 of the act could be improved to include requiring the disorderly councillor:

- to cease the act of disorder and desist from repeating that act for the duration of the meeting
- to refrain from participating in discussion or debate on business before the meeting for a specified item or specified time or for such time as they continue with disorderly conduct. (This is consistent with the current power of the chair to ‘mute’ a councillor’s audio link at an audio-visual meeting.)
- to withdraw from the meeting for a specified time or for the remainder of the meeting.

In some jurisdictions, the power to exclude from a meeting for disorderly conduct includes power to require the councillor to depart from the premises to prevent them lobbying or causing disturbance in the corridors or other rooms or from the public gallery.

Any sanction imposed by the chair (not just expulsion) should not prevent any other action being taken against the councillor for the act of disorder concerned, where it also represents serious or repeated disorder or some other breach of the code of conduct. Conversely, any complaint about a matter arising at a meeting lodged after the event may be dismissed if it was appropriately dealt with summarily at the meeting.

Incidents of repeated disorderly meeting behaviour (for example, similar sanctions or suspensions issued at three consecutive meetings or four non-consecutive meetings in any period of twelve months) should be deemed to be serious misconduct and dealt with accordingly.

Where a councillor refuses or fails to comply with the direction of the chair in matters of disorder, the chair should be empowered to suspend the councillor for the remainder of the meeting, without requiring a resolution of the council.

Any refusal to comply with that direction should be deemed to be misconduct and dealt with accordingly. In addition, the meeting chair should have power to have the councillor removed and/or adjourn the meeting until the councillor's departure or removal is completed.

Any misuse of power by the chair in administering the disorder provisions should be dealt with as serious misconduct or breach of integrity, depending on the circumstances and subject to complaint under the normal conduct provisions. For example, where it is established that the chair expelled a councillor without due cause, the chair's action will be considered to be a breach of integrity and dealt with accordingly. If proven the resulting resolution could be deemed invalid and the matter resubmitted for council decision.

6.4 Interstate comparisons

The Sansom report reveals:

*'Qld has distinct arrangements for 'Unsuitable Meeting Conduct', granting considerable authority to chairs of meetings to administer 'summary justice', and autonomy to councils in determining further action if required. A similar approach is being adopted in SA. There is an evident trend towards enabling councils to handle poor conduct in meetings separately from the broader complaints system, at least in the first instance.'*¹³

Queensland's Inappropriate Meeting Behaviour (Code of Conduct) preamble

'Unsuitable meeting conduct under the legislation, any conduct by a Councillor that is contrary to the standards of behaviour in the Code of Conduct that occurs within a meeting of Council (including standing committee meetings), is dealt with as unsuitable meeting conduct. Unsuitable meeting conduct by a Councillor is dealt with by the Chairperson of the meeting. It is important that the Chairperson deal with matters of unsuitable meeting conduct locally, and as efficiently and effectively as possible so that Council can continue with their business of making effective decisions in the public interest.'

NOTE Chairpersons of meetings are carrying out a statutory responsibility under the legislation to manage and lead the meeting. As such, where a Chairperson behaves inappropriately in a meeting this involves a serious breach of the trust placed in them as the Chairperson of the meeting and may be dealt with as misconduct.

6.5 Recent NSW Inquiries

Another consideration is whether the councillors themselves create a situation where the meeting chair finds it difficult to maintain appropriate standards of behaviour within the meeting. A recent public inquiry into the Wingecarribee Council resulted in the following findings by that Commissioner:

'1 ...

b. There were repeated instances of inappropriate behaviours by some Councillors during meetings, briefings, and in other interactions with staff, which were not adequately or effectively addressed by the other Councillors

*c. The failure of the other Councillors to effectively respond to those instances of behaviour contributed to the creation of a permissive environment in which they would occur, which in turn contributed to the dysfunction within the Governing Body.'*¹⁴

6.6 Chairing skills

Empowering a mayor to control the conduct of councillors in meetings with relevant sanctions as proposed assumes that each mayor has the necessary skill and experience to carry out their intended role effectively. Not all mayors have, or are permitted by their councils to have, the required respect and authority to exercise the role of meeting chair in a manner that accords with the type of chairmanship observable in state and federal parliaments. In the latter, disorder in proceedings is dealt with summarily and accepted by the chamber.

In his report Wingecarribee Public Inquiry, June 2022 Commissioner Ross Glover echoed these thoughts when he recommended:

*'That a standardised mandatory training for Mayors and Deputy Mayor's be developed in relation to the Code of Meeting Practice (which can be supplemented to include any variances in the particular Code adopted by the particular Council) and skills and techniques for chairing meetings, including particular focus on meeting procedure, maintaining order, and techniques and powers for dealing with acts of disorder, with such training to be undertaken within a reasonable time of been elected to the position.'*¹⁵

Accordingly, apart from placing the obligation on the mayor to act with authority, there will be a need to provide training and development for mayors who may not be confident in that role. In extreme circumstances, where council meetings become beyond the capacity of the mayor to control in accordance with the Model Code of Meeting Practice, the OLG should have intervention powers to provide a supporting resource.

This could be in the form of either a meeting practice adviser or moderator attending meetings and supporting the mayor in maintaining and enforcing orderly conduct, on an interim basis. Should the disorder persist, the OLG might need to consider whether circumstances warrant recourse to a Performance Improvement Order.

In terms of assisting mayors and meeting chairs to develop their skills in this area, LG NSW might also have a part to play in offering training and mentoring to its members in meeting management.

14 Glover R, Wingecarribee Shire Council Public Inquiry Report June 2022, P7

15 Ibid p251

RECOMMENDATIONS

XVIII. That the power of mayors and meeting chairs to manage disorderly meeting conduct be strengthened by including power to order an offending councillor

- a. to cease the act of disorder and desist from repeating that act for the duration of the meeting.
- b. to refrain from participating in discussion or debate on business before the meeting for a specified item or specified time or for the remainder of the meeting, consistent with the current power of the Chair to “mute” a councillor’s audio link at an audio-visual meeting.
- c. to withdraw from the meeting for a specified time or for the remainder of the meeting.

XIX. That Section 10 of the Local Government Act 1993 be amended to empower the mayor or chair to expel a disorderly councillor without needing to obtain the resolution of the meeting.

XX. That the code of conduct include provision for mayors/meeting chairs who fail to deal with disorder or misuse of the power to be subject to complaint for serious misconduct.

XXI. That the code of conduct and code of meeting practice clarify that all councillors attending meetings have an obligation to maintain order and assist the mayor/meeting chair in maintaining order.

XXII. That provision be made for OLG intervention by way of providing or partnering with LGNSW or other appropriate Sector stakeholders in providing councils with a meeting conduct adviser or meeting moderator where appropriate.

7. DETECT AND MANAGE

Avenues are available through various audit mechanisms to identify breaches of the code of conduct or through public inquiries that expose particular circumstances where breaches have occurred. However, detection of breaches of the code of conduct involving councillors is currently reliant on reporting by some third party to the council’s general manager. They then initiate action from a selection of options available under the code and its administrative procedures.

The current framework specified under the procedures for administering the code of conduct includes procedures for councillors, administrators, council staff, advisors and appointed committee members. It comprises:

- a requirement that each local government establish a panel of conduct reviewers (or join with other local governments in establishing a joint panel) by formal expression of Interest
- appointment of a council complaints coordinator with the role of:
 - a) coordinating the management of complaints made under the council’s code of conduct
 - b) liaising with and provide administrative support to a conduct reviewer
 - c) liaising with the OLG
 - d) arranging the annual reporting of code of conduct complaints statistics
- a complaints process involving initial submission to the council’s general manager, who may:
 - decline to deal with the complaint for various reasons prescribed under Clause 5.3 of the procedure
 - take no action
 - refer the matter to another agency including the OLG
 - refer the matter to the council’s complaints coordinator for referral to a conduct reviewer
- referral back to the general manager or mayor the results of preliminary assessments or investigations for resolution.

Special arrangements are provided for dealing with complaints about the general manager and the mayor.

Provision is also made for special complaints management arrangements under which a general manager may request the OLG to handle certain complaints giving rise to circumstances specified in the procedures.

A number of submissions received during the consultation phase of the review expressed concern at perceived deficiencies in various aspects of this framework.

7.1 Overall conduct review framework

As mentioned earlier, the overall framework of councillor accountability requires the interaction of a number of legislative and administrative instruments. It is also dependent on the interaction of a variety of stakeholders, officials and agencies according to an assumed rational and objective evidence gathering and evaluation model, followed by an impartial and well-reasoned decision-making process. The current framework is also imbued with a mix of variable process options permitted by local selection of triage arrangements, review panel composition and assignment for preliminary assessment/investigation. This results in considerable diversity of approach (even within the overall compass of the procedures) and therefore risks inconsistency of standards and outcomes. Often this inconsistency occurs in how similar complaints are treated in the same local government.

The current level of concern and the variable results being achieved from the current framework, including the reported ambiguity and uncertainty, indicate that the interplay of the various parts is not happening as intended and needs clarification or revision.

Key concerns articulated by submitters included:

- actual and perceived lack of independence of general managers in the key role of preliminary assessor of complaints and the invidious position in which they are placed with respect to their employment
- the arrangements for appointing panels of conduct reviewers and the assignment of cases to individual conduct reviewers
- variability of competence and diligence of conduct reviewers
- the restricted power of councils to impose penalties for proven breaches of the code of conduct
- the power of councillors to reject a review finding to protect a fellow councillor
- lack of clarity in the code of conduct concerning various classes of behaviour and the manner of dealing with them
- the length of time taken to review and investigate complaints both by conduct reviewers and the OLG
- the complexity of the framework that impedes early determination of complaints and adds to the cost of using the framework
- the lack of deterrent in the penalties historically imposed by the OLG and NCAT
- concern to ensure the protection of the *Public Interest and Disclosure Act 2022* (PID Act) is maintained.

The basis of many of the concerns expressed by submitters to the review is the intimate involvement of the council in a process that is intended to examine and determine the conduct compliance of members of their own governing body, for the purposes of holding them accountable for their personal actions. This is seen by many as a fundamental conflict of interest. Councillors may be considered 'close associates' in the business of the council. Whether they have supporting or opposing political viewpoints, there is opportunity for accusations of apprehended bias within the council when it comes to deliberating on a conduct review recommendation adversely affecting one of their fellow councillors.

Aligned to this issue is the matter raised by a number of submitters concerning the role of the council's general manager in the current framework. This is particularly of concern where a general manager directly exercises the powers provided under the procedures to dismiss complaints as frivolous or vexatious, decline to investigate further, or decide to take no action. Although the general manager may delegate these powers under the procedures to a council complaints coordinator, the exercise of those powers by that officer may still be seen to be under the influence of the general manager to whom that officer reports.

Both LG New South Wales and Local Government Professionals NSW, as peak bodies with stakeholders in the sector, raised concerns about the invidious position in which this places general managers and the risk of direct or indirect reprisal for their actions.

Submitters suggested a wide range of responses to the situation, including establishing a Council Ombudsman role for complaints, requiring all complaints to be lodged with the OLG, or establishing a new independent state agency to assume the complete management task.

7.2 Interstate comparisons

There are various models used in other state jurisdictions aimed at assuring a high level of independence in managing councillor conduct complaints.

The Sansom report provides the following comparison of councillor complaint triage arrangements:

*'In Qld, all complaints must be made to the OIA, which determines how they are to be handled. Elsewhere, complaints are typically lodged with the relevant council in the first instance. The council may have unqualified authority to deal with them itself, but in most jurisdictions many (or in Tas, all) complaints are 'triaged' by the executive officer or chair of the relevant statutory panel (in Victoria the Principal Conduct Registrar or, for complaints about more serious misconduct, the CMI). They may then be returned to the council for appropriate investigation and determination, or escalated.'*¹⁶

*In all jurisdictions frivolous, vexatious or insubstantial complaints are to be dismissed, either by the council itself or the 'triage' authority. In Tas, the panel chair may direct the complainant not to repeat such an accusation. In Qld, the OIA may impose penalties for improper complaints.'*¹⁶

The Sansom report also reveals:

'All jurisdictions except Tasmania empower or require councils to handle lower-level breaches of the Code/adopted council policy. In Tas, the council General Manager simply makes sure the complaint is properly documented and then forwards it for consideration by a panel chair or full panel. In Qld, the OIA may return some complaints to councils for investigation and determination, or proceed to handle the matter itself. In Vic, the Principal Conduct Registrar (PCR) decides whether to return a complaint to the council, although councils may have already sought to resolve the matter themselves through mediation or counselling. In SA, all behavioural matters are to be handled in the first instance by councils under their Behaviour Management Policy.

*As a general rule, councils are encouraged or required to use independent reviewers, arbiters or panels to undertake investigations and recommend or make determinations. In Vic, the arbiter is appointed by the PCR. In Qld, the council must proceed in accordance with the approach recommended by the OIA.'*¹⁷

In NSW, the concept of the council appointing a panel of conduct reviewers has been an attempt to separate the conduct review process to some degree from the general manager and council. However, full separation has not been achieved. Pivotal decisions about to whom a complaint (other than for serious misconduct) should be referred for review, and the subsequent implementation of outcomes from the review, still remain in many instances with those most closely affiliated with the subject of the complaint and, in some cases, with the complainant.

7.3 An issue of independence

A common theme raised by submitters to the review was the need for independence at various levels of the complaint process:

- independence from councils or general managers to prevent either undue declining to deal with complaints or selectively allocating a conduct reviewer to achieve a pre-determined outcome...and to protect general manager from retributive termination
- independence in the preliminary assessment and investigation to prevent councils or general managers either shutting down a complaint or pursuing a matter without due cause
- independence in dealing with minor conduct matters as expeditiously as possible without multiple layers of referral for review or appeal
- independence in applying the outcome such that councils may not either ignore a reviewer's recommendation or impose a penalty not recommended
- independence for conduct reviewers in not having to seek direction from OLG before recommending certain matters or having their investigation 'called in' or reviewed by OLG.

These motives underpinned a number of submissions seeking the complaints process to be in the hands of a completely independent body – neither council nor OLG. There were strong views that OLG timeframes of over 2 months for simple matters, and over a year for more serious matters, were not just a matter of resources available to OLG but the manner in which investigations were handled.

A summary of views from submitters in this respect reveals:

- No opinion = 15%
- Retain current framework = 9%
- Remove general managers and councils, but no other suggestions = 13%
- OLG to deal with ALL complaints = 7%
- Establish an Independent Conduct Reviewer Panel appointed by OLG = 11%
- Provide conduct reviewer/panels with full independence = 18%
- Fully independent agency separate from OLG = 27%

The proposed framework for the Independent Councillor Conduct Review Panels will satisfy many of the independence and efficiency principles expressed by the sector by:

- requiring mayors to deal with meeting behaviour and, as a general rule, keeping such matters outside the broader complaints stream
- not letting complainants submit minor conduct complaints directly to OLG
- allowing Independent Councillor Conduct Review Panels (with accredited/qualified members) to deal with as many conduct complaints as possible within relevant jurisdiction

17 Ibid

- providing a capable panel chair to triage and oversee local determination of complaints, with the added rigour of peer review through a determinations panel, to avoid the need to deal with requests to review findings of fact
- providing Independent Councillor Conduct Review Panels with authority to make orders or directions within their jurisdiction to finalise complaint outcomes without relying on councils to adopt their recommendations
- providing for the necessity to escalate certain matters where the jurisdiction of the panels is insufficient to adequately penalise or deter serious misconduct/integrity offences or repeated breaches
- ensuring the protection of the PID act is maintained for relevant complainants.

With the Independent Councillor Conduct Review Panel framework meeting these principles, the issue of the most appropriate form of agency oversight needs to be resolved.

7.4 The OLG's role

Section 7 (e) of the Local Government Act 1993, establishes a key purpose of the Act as being 'To provide for a system of local government that is accountable to the community and that is sustainable, flexible and effective'. The OLG's role in this context includes:

- monitoring of the effectiveness of the legislative environment in which local government is to operate and continuing to provide legislative and policy response to emerging issues across the sector
- providing support programs to enable local governments to access government funding and other resources for the benefit of their communities
- providing oversight and intervention to promote the effective performance of councils and the collective performance of the sector.

Councillor conduct accountability as part of the latter function has encountered such resourcing and practice challenges as to detract from the overall effectiveness of the OLG in this area. Divesting the OLG of the need to deal with individual councillor conduct complaints will release resources to focus more effectively on the corporate performance of councils in financial, compliance and service areas, including capacity building.

The current proposals in the review are based on the proposition that, as far as possible, all complaints about the conduct of individual councillors should be dealt with by Independent Councillor Conduct Review Panels, at least in the first instance, with an independent oversight body to manage the effectiveness of the framework.

Graham Sansom's interstate research found that

'No other state agency has been given the extensive role and authority [in councillor conduct matters] as exercised by the NSW OLG – notably its heavy involvement in dealing with and determining mid-range complaints, as well as investigating the most serious breaches, its right to intervene (as opposed to assist) in lower-level matters being handled for councils by reviewers, and its power to impose penalties'.

...

As a general rule, the equivalent agencies (and their chief executives) elsewhere are largely limited to overseeing the system and supporting and advising the Minister as required.'¹⁸

7.5 A new framework

Rationale for change

The current councillor conduct complaints framework dates back to at least 2012, when the OLG investigations team was reorganised. The same policy and administrative model of direction is generally that which we see today. In 2015, as a result of research by Dr. Tim Robinson, the sector identified the following areas as needing to be addressed:

- strengthened independence of assessment and investigation regime
- more sanction options more commensurately applied
- clarity and consistency of meaning and its application in practice
- improved standards for conduct reviewers
- improved timeliness of response from the OLG.

Despite minor changes since then to the code, procedures and guidelines, the same central issues remain in need of legislative and structural reform.

For a decade, the policy, practices and operational constraints on the OLG have made it impossible to respond adequately to the councillor conduct environment. Those constraints appear unlikely to change under the existing framework. Powers already available to the OLG and NCAT are not sufficiently applied to deter misconduct.

Feedback from the consultation reveals key stakeholders in the NSW local government sector have lost trust and confidence in the current framework leading to any improvement under the current administrative model

The number of public inquiries into local government has not reduced and the findings from these and other ICAC operations that reference councillor conduct as contributing factors to the dysfunction of those councils, reinforces the view that the current framework is not working. Experience over the last decade demonstrates that merely tinkering around the edges will not produce quantum change in the culture of councillor conduct, particularly in those local governments that are vulnerable because of their political, social or economic context.

Consequently, an approach quite different to the existing model is required if real progress in re-establishing civic responsibility in those areas of present concern is to be achieved.

To address the independence issue without imposing significantly higher cost of administration, the overall framework requires restructuring.

The current framework for receiving and dealing with complaints about councillor conduct is not, of itself, ineffective in addressing all conduct issues. However, some aspects in operation give rise to the concerns mentioned above and need to be reformed by a general restructuring of the framework.

Suggestions for imposing significant additional burden on the OLG for the conduct complaints process would require substantial additional resources. It would also be likely to further detract from the organisation's other higher value responsibilities in relation to oversight of the local government sector's capacity and performance.

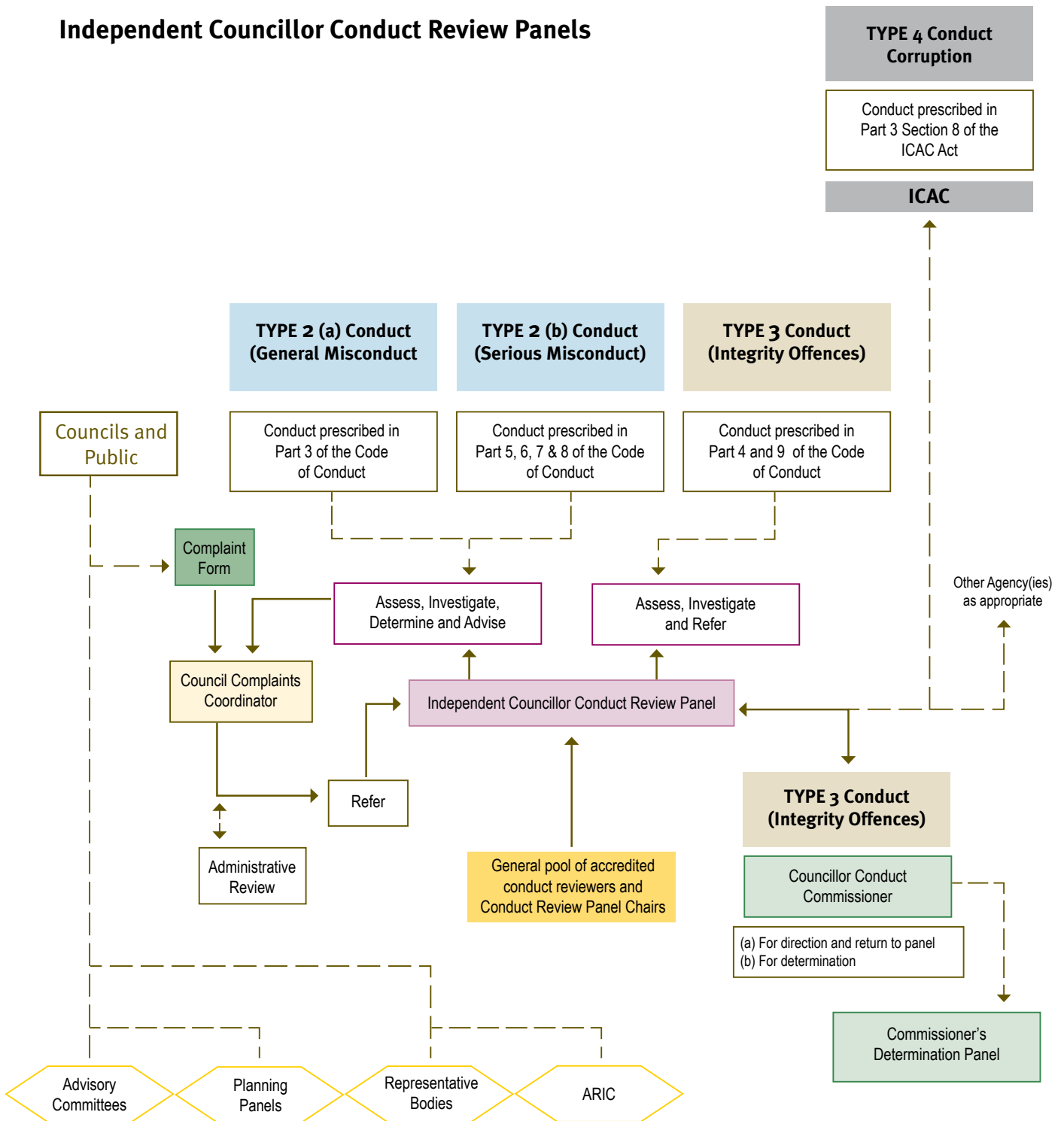
The general approach to reform should be based on a variation of the current framework, where the detail of complaint assessment, investigation and determination is devolved to accredited Independent Councillor Conduct Review Panels under the broad oversight of a body separate from the OLG, but still under the umbrella of the Local Government Act. This body would prescribe the procedures for the panels' operation, undertake quality assurance of the outcomes and moderate an escalation process. This body could also deal with the more serious and complex matters and enable the establishment of a central registry of all conduct complaints (which has been a missing element of the current framework) for improved analytical and accountability purposes. Transparency could be assured by a suitably formatted public register being maintained on the body's website, setting out appropriate details of complaints dealt with and sanctions imposed. This would also assist in tracking repeat offenders and those approaching the 'three strike' threshold for referral to NCAT.

A new model

To implement the above change, establishment is proposed of an office to be known as the Councillor Conduct Commissioner to perform the role of the independent oversight body.

The proposed new model could appear as follows:

Independent Councillor Conduct Review Panels



The current framework possesses a satisfactory skeleton on which to build an improved structure. Key features required to assure independent and effective complaints management include:

- empowering and obliging mayors to enforce orderly meeting conduct by summary orders at council and committee meetings (See Section 6 above)
- replacing the general manager as the pivotal point for triage and preliminary assessment of complaints
- providing an administrative filter (a council's complaints coordinator or ombudsman) to assure the administrative formality of complaints lodged to reduce the number of invalid complaints entering the process
- removing councils from the referral phases of the process while retaining their obligation to comply with outcomes of conduct reviews
- creating Independent Councillor Conduct Review Panels to operate independently, under the executive oversight of an independent Councillor Conduct Commissioner with power to implement the proposed reforms
- empowering Independent Councillor Conduct Review Panels to receive and deal with complaints for certain classes of conduct issues (see Section 7.12 of this report), by:
 - creating Independent Councillor Conduct Review Panels comprising a chair and a number of conduct reviewers
 - the Minister for Local Government, in consultation with Local Government NSW, appointing chairs and conduct reviewers, subject to appropriate selection criteria regarding qualifications and experience
- empowering panel chairs to receive (from a council's complaints coordinator or council ombudsman) and assign complaints to a member of the panel for preliminary assessment and/or investigation, and to decide on the basis of their report the outcome of the review, or in the case of serious or complex issues, convene a determinations panel to peer review the report and determine the outcome
- establishing procedures containing uniform standards for preliminary assessment and investigation of complaints for guidance of the panels
- establishing a prescribed schedule of conduct offences and related sanctions and penalties to guide panels in determining outcomes of complaints within their jurisdiction, including increasing penalties for serious and repeat offences
- mandating all conduct complaints be submitted to the council's complaints coordinator/ombudsman in the first instance. (In other words, removing the option for complaints to be submitted directly to the OLG)
- providing appeal mechanisms from panel determinations for aggrieved parties to NCAT on matters of law and natural justice
- establishing the authority of the Councillor Conduct Commissioner to determine the outcome of more serious conduct and integrity breaches, including referral to NCAT or OLG for consideration of matters within their jurisdiction.

7.6 The Councillor Conduct Commissioner

It is proposed a separate Office of the Councillor Conduct Commissioner (the Commissioner) be created as a statutory office separate from the OLG, but still under the umbrella of the Local Government Act.

The aim would be for the Commissioner to oversee and manage the new framework of Independent Councillor Conduct Review Panels, with sufficient authority and power to exercise the various mandates proposed under the new arrangements.

Independence from mainstream OLG functions is essential to maintain consistency with the concept of the Independent Councillor Conduct Review Panels and to provide an appropriate interface between the jurisdiction of the panels and that of the OLG's Sector capacity building, performance and intervention functions.

Separation of these powers enables transparency in the referral of matters for OLG consideration and avoids any perception that the panels are acting under the direction of or may be arbitrarily overridden by that function.

This will also encourage trust and confidence in the capability of the new framework to resolve and determine the vast majority of councillor conduct matters within its own independent panel context efficiently and expeditiously.

Sufficient safeguards will be available to the Commissioner to ensure the effective working of the panel process so as to avoid the necessity for any 'call-in' powers for mainstream OLG on individual complaints.

Clarity of jurisdiction will be provided through the definition of collaborative links between the Commissioner and the OLG in matters where individual councillor conduct impacts on the corporate performance of a council and in the sharing of sector intelligence to enable continuous improvement of all facets of sector capacity building.

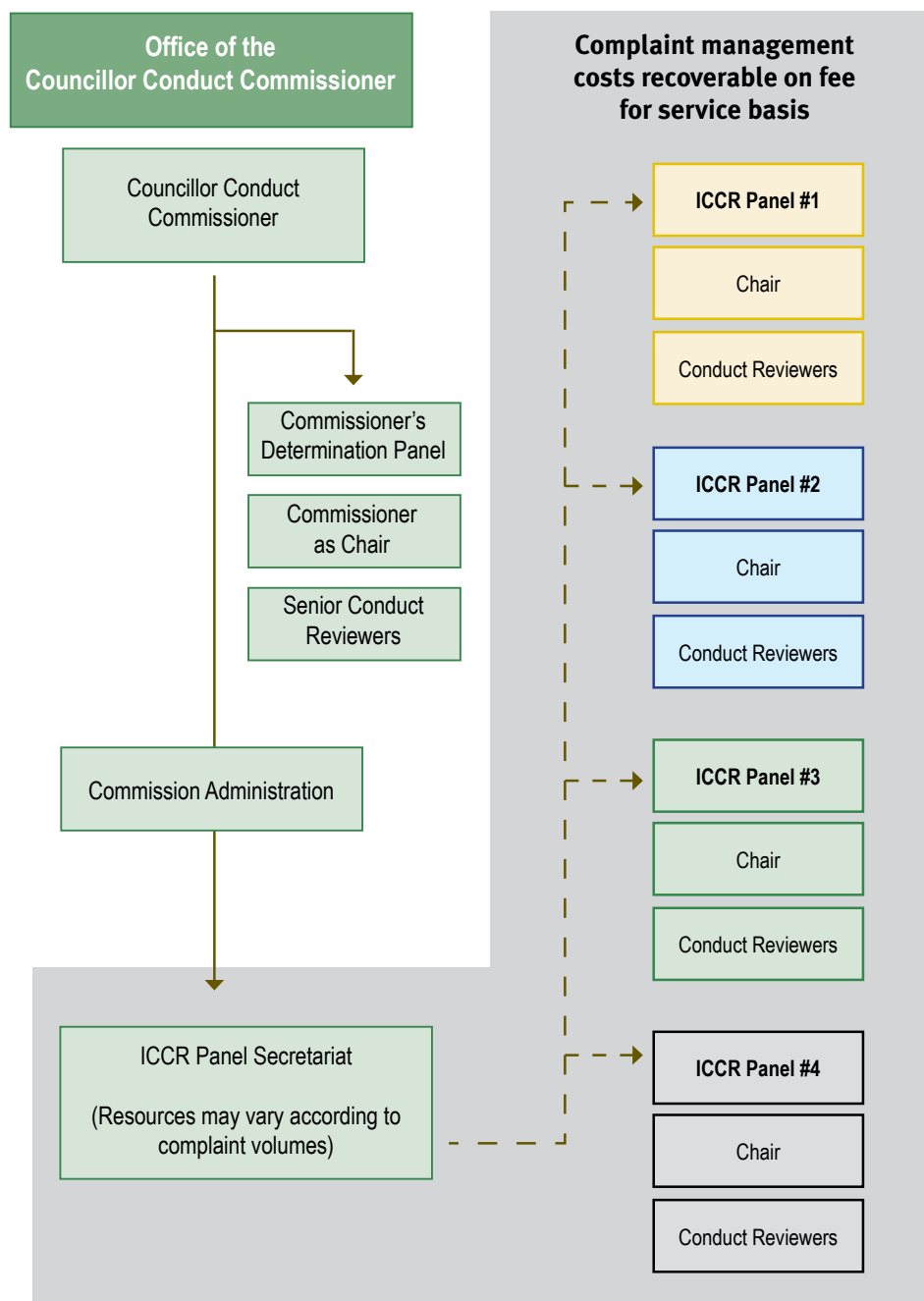
The Office of the Commissioner would comprise:

- The Councillor Conduct Commissioner – appointed by the Minister for Local Government and conferred with powers to direct the functioning of the Independent Councillor Conduct Review Panels, including establishing the panels, recommending appointment of panel chairs and conduct reviewers, issuing directives and guidelines for operating panels, adjudicating on referrals from panels for determination or referring to other relevant agencies, and dealing with any complaints about the determinations of panels.
- Independent Councillor Conduct Review Panels Secretariat – to provide administrative assistance to the Commissioner and the Panels, including monitoring of panel performance data.

Office of the Councillor Conduct Commissioner

POWERS

- Direct the functioning of the Independent Councillor Conduct Review Panels, and oversee the effective operation of the overall panel framework.
- Support the panels with direction and advice as necessary.
- Recommend panel appointments, guidelines and directions to the Minister.
- Exercise delegated powers in relation to serious complaint determinations.
- Maintain (and share with OLG) Sector knowledge and research re: councillor conduct.
- Report to OLG conduct matters likely to impact on a council's governance.
- Ongoing engagement with Sector stakeholders.



7.7 Conduct review panels

Commenting on interstate comparisons, the Sansom report reveals:

'For 'mid-range' breaches all jurisdictions have legislated statutory panels (in Qld, a Conduct Tribunal) to determine complaints and/or decide if they should be referred elsewhere (eg to the Civil and Administrative Tribunal, a court, a law enforcement body or back to the council). In NT and SA, such panels are established in cooperation with the state local government association.

*Panels may or may not have formal powers of investigation, but all can gather required information, compel the parties to attend, and must grant the respondent the right to make a submission. Most jurisdictions allow the panel to determine its own procedures within broad guidelines and all waive the rules of evidence. Typically, panels are instructed to proceed with as little formality and technicality, and as quickly as is appropriate, consistent with procedural fairness.'*¹⁹

The current arrangement by which NSW councils appoint their own conduct review panels creates opportunity for inconsistency and gives rise to some of the concerns identified by submitters about both the independence and effectiveness of preliminary assessment and investigation processes. In theory, the current arrangements could generate more than a hundred different conduct review panels, each possibly with different personnel and different ways of approaching assessments and investigations. There is no coordinated cross-communication among the panels, nor any mechanism for individuals within each panel to ensure the uniformity of their methodology or quality of outcomes. The OLG does not keep records of each of the established panels or monitor the appointment of conduct reviewers in terms of compliance with the selection criteria contained in the procedures. There is no record of any audit (by the OLG or the NSW Audit Office) of council panels to establish compliance with the appointment requirements or selection criteria of panel members.

Guidelines and procedures available for the administration of the code of conduct do not extend to mandating uniform practice guidelines for undertaking investigations in the context of securing and evaluating evidence, judging the balance of probabilities and ensuring natural justice principles are observed.

A number of submitters raised issue with the current arrangements for appointing review panels. They called for the OLG to have this responsibility, with some suggesting the solution of a single, consolidated, panel under its supervision. Other submitters supported a new independent agency to take on the role of the review panels.

Creating a new independent state agency to receive and investigate all councillor conduct complaints is not considered conducive to either cost containment or maintaining a sensitivity to local conditions. A suitable compromise, that permits control of uniform and consistent approaches as well as a higher degree of independence than currently available, would be to create a new arrangement of Independent Councillor Conduct Review Panels to serve groupings of local governments. Determining the groupings could be a role for a new the Councillor Conduct Commissioner based on the perceived demand for panel services as discernible from the history of complaints from various council groups.

That is, there may be more councils assigned to a group where the combined number of complaints in recent times is low and just a few councils to a group where the number of recent complaints is high. In extreme cases, a panel might be assigned to a single local government where the complaint load is very high. Of course, in such circumstances, one would expect the OLG to be considering other means of intervention.

7.8 Establishment of Independent Councillor Conduct Review Panels

To avoid the issue of actual or perceived bias, or lack of independence in the appointment of conduct review panels by individual councils, the Minister could be empowered to establish an Independent Councillor Conduct Review Panel for each nominated group of councils in a similar fashion to that used for the appointment of Regional Planning Panels.

In this respect, the Commissioner would recommend to the Minister appropriate groups of councils to be served by Independent Councillor Conduct Review Panels. The membership of these groups would be determined on an appropriate basis of geography and history of Councillor conduct complaints. This would enable the appointment of a panel suitable to the circumstances. Panels could then be reconfigured from time to time to meet varying volumes of complaints from those local government groups.

A preliminary analysis of the current dispersion and volume of complaints indicates that a likely structure of up to five panels at most would adequately service the need, based on the proposed reforms of complaints handling process and practice. Indeed, over time as the reforms gain momentum, it would be hoped that the number of panels required would reduce.

Eligibility for appointment to a panel would be by invitation by the Commissioner to join a general pool of accredited councillor conduct reviewers and panel chairs. The members of the general pool would be selected through an open process of expressions of interest conducted by the Commissioner using appropriate criteria of qualification, competence and experience. Based on the number of independent conduct reviewers currently active in the sector under current arrangements, there is every confidence that a well credentialed general pool of reviewers and panel chairs would be available.

The panel for each group of councils would be appointed by the Minister for Local Government on the recommendation of the Commissioner and, similar to the arrangement with planning panels, in consultation with appropriate Sector stakeholders .

Each panel would consist of a panel chair and a number of panel members (perhaps between three and six depending on the volume and complexity of complaints likely to be received from the councils in the group), who would be independent conduct reviewers. Terms of appointment for both chairs and conduct reviewers could be three to four years and preferably not co-terminus with council electoral terms.

The panel chair would be reputable, experienced in local government matters, well-versed in the legislation and procedures applicable to councillor conduct accountability, and capable of exercising due diligence and good judgement in determining conduct review matters.

Independent conduct reviewers would be appointed to the panel based on appropriate qualifications and experience. Each would be reputable and have demonstrated skills in assessing investigating complaints about councillor conduct. Panel members would also be capable of facilitating any mediation desirable between parties in dispute, with a view to achieving early resolution in appropriate circumstances.

The role of the chair is envisaged as follows:

1. Receive and examine complaints from the council's complaints coordinator or council ombudsman for the purposes of triaging the complaint to determine its allocation to one of the conduct reviewers appointed to the panel. The Chair will assign an appropriate member of the panel to conduct a preliminary assessment of the complaint in accordance with the prescribed procedure. In doing so, the chair will be mindful of the respective qualifications and experience of panel members, to match their attributes to the complexity of the complaint and to avoid any actual or perceived conflicts of interest in that assignment.

2. Receive reports from assigned conduct reviewers concerning their preliminary assessment and, based on the chair's evaluation of that report:

- a. adopt the conduct reviewer's recommendation, or
- b. return the report to the conduct reviewer for further assessment in the light of additional guidance or request for more information provided by the chair.

3. Receive preliminary assessments from conduct reviewers and, subject to examining and confirming the application of due process to that assessment, consider the recommendation and determine the required action, which may involve advising the council's complaints coordinator that the complaint:

- a. has been found to be frivolous or vexatious
- b. is not a code of conduct complaint or of insufficient substance to warrant further investigation
- c. is a matter within the jurisdiction of another agency to whom the matter has been referred
- d. involves a Type 1 conduct (disorderly meeting conduct), which ought to have been dealt with by the meeting chair
- e. involves a Type 4 conduct (corrupt conduct), which will be referred to the ICAC under relevant legislation
- f. is considered to be sufficiently substantiated to warrant further investigation involving a Type 2 or Type 3 conduct (general conduct obligations, misconduct or integrity breach) and is to be referred to a conduct reviewer from the panel to progress an investigation.

4. In respect of matters referred to in paragraph f. above, appoint a member of the Independent Councillor Conduct Review Panel to undertake the investigation. That member may be the same member who conducted the preliminary assessment or another member.

5. In respect of matters referred to in paragraphs c. or e. above, refer the complaint to the relevant agency together with the conduct reviewer's report on the preliminary assessment.

6. Where the investigation concludes the complaint has not been substantiated, the conduct reviewer's report may be considered by the Chair alone for determination. Alternatively, the Chair may in their discretion submit the conduct reviewer's report to a meeting of the determinations panel (i.e., chair and at least two panel members), for determination.

7. Subject to clause 8 below, where the investigation concludes that the complaint has been substantiated and recommends action be taken to sanction or penalise the councillor, the conduct reviewer's report would be submitted to a meeting of the Determinations panel (i.e., chair and at least two panel members), for determination. The Chair will have responsibility for implementing the decision of the panel, appropriately liaising with the council's general manager on any administrative arrangements required, such as in the case of suspensions. Where the panel is divided on any issues the Chair shall exercise a casting vote.

8. Where the investigation mentioned in clause 7. above finds that the conduct represents a breach of Type 3 conduct provisions (generally Part 4 or Part 9 of the current code of conduct), the chair will refer the investigation report to the Councillor Conduct Commissioner for direction as to how the matter is to be resolved. The Commissioner may return the report to the panel with directions to proceed with its findings or alternatively convene a Commissioner's Determination Panel comprising the Commissioner and at least 2 experienced accredited conduct reviewers from the accreditation general pool, to determine the matter.

9. The panel chair or Commissioner respectively will have authority to impose sanctions and penalties as prescribed for any breaches of the code of conduct within the jurisdiction, and those decisions will be binding on the parties concerned. Failure to comply with sanctions or a penalty imposed by a panel or the Commissioner will be deemed to be serious misconduct and make the councillor liable to additional penalties imposed by the Commissioner or other relevant agency.

10. Any party aggrieved with the determination of a panel or the Commissioner should be able to appeal the decision to NCAT, but only on the grounds of denial of natural justice and not on findings of fact.

7.9 Independent conduct reviews

Independent conduct reviewers appointed to a panel should have powers of investigation commensurate with the seriousness of the alleged offences. Conduct reviewers will be required to observe uniform standards of investigation to be prescribed in uniform investigation practice guidelines authorised and published by the Councillor Conduct Commissioner, accompanied by templates tools and explanatory notes to ensure quality and consistency of application. To achieve this, consideration might be given to declaring the manual as an order or regulation.

Panel chairs and conduct reviewers, on appointment, will receive training arranged by the Commissioner in their powers, duties and obligations and in the consistent application of the uniform investigation practice guidelines. From time to time, both chair and panel members should be required to attend workshops convened by the Commissioner. These will provide interaction with and information exchange between other councillor conduct review panels as well as opportunity to receive updates on legislation and practice matters associated with councillor conduct accountability.

A regular forum of councillor conduct review panel chairs should be convened to exchange information and experiences concerning their particular roles in managing the work and performance of their councillor conduct review panels.

Panel chairs will be responsible for periodically reviewing the performance of the panel members, to maintain quality and consistency of both preliminary assessments and investigations. Appointments of panel chairs and conduct reviewers should be reviewed on a periodic basis and adjustments made as appropriate to ensure ongoing capability, capacity and competence, as well as managing any conflicts of interest.

Panel chairs should be required to provide quarterly reports to the Commissioner concerning the outcomes of preliminary assessments and investigations carried out by the panels. This will enable the Commissioner to maintain effective oversight of the conduct review framework and receive feedback on the effectiveness of legislation and the investigation procedures to enable continuous improvement. This will also help with maintaining the central conduct complaints register.

Each panel will be provided with administration support from the Commissioner's Office. This support will help the chair receive and allocate complaints, prepare agendas for panel meetings, liaise with conduct reviewers on assignments, liaise with council complaints coordinators, and manage correspondence and records.

Council complaints coordinators will be required, as under the current procedures, to provide information and other cooperative support to panels as necessary.

7.10 Complaints

Under present arrangements, there is no formal direction as to how a complainant should frame their complaints. Neither is there guidance as to what information should accompany the complaint to both validate the bona fides of the complainant and provide substantiation for the grounds of the complaint. Indirectly, the model procedures for the Administration of the Code of Conduct provide guidance as to what attributes of a complaint will render it liable to be rejected.

Ideally, prospective complainants are aware of what constitutes valid grounds for making a complaint about councillor conduct and what information they should provide to enable their complaint to be accepted in the first instance and then effectively investigated and determined.

To that end, the Commissioner should prescribe a standard councillor conduct complaint form designed to gather all necessary information about the complainant and the complaint to enable effective processing.

The form should be available for downloading from the Commissioner's and all council websites or be able to be lodged online with links to the appropriate council complaints coordinator.

For complete clarity it is not proposed in anyway to alter the way in which complainants may make public interest disclosures under the *Public Interest and Disclosure Act 2022*.

7.11 Local administrative assessment

Following on from the earlier discussion concerning removal of the general manager from any role in the processing of councillor conduct complaints, the reception of such complaints still needs to be focused on the local government as the natural destination for complainants to refer their complaints. The initial handling of those complaints should, however, take a different form.

Many of the submitters had concerns about the current role of general managers placing them in the invidious position of initiating complaint procedures about their own councillors. As well as opening questions about perceived independence, the concerns also related to that fact that diligent general managers were exposed to reprisal from aggrieved councillors through the 'no cause' termination provisions common in their employment contracts.

Under the proposed new framework, the council's complaints coordinator would assume the role of the general manager under the current framework, in receiving all councillor complaints lodged with the local government. The complaints coordinator will be charged with the responsibility of examining the complaint for administrative formality only. This means confirming the compliance of the complaint in:

- a) being submitted within the statutory timeframe
- b) not being a complaint about disorderly meeting conduct
- c) being submitted on the prescribed form
- d) identifying the subject person and the conduct alleged
- e) containing the mandatory information required to enable referral to the Independent Councillor Conduct Review Panel.

In the case of a) and b) above, the complaints coordinator may reject the complaint and return it to the complainant, advising of its informality on the grounds of being out of time or not a complaint within the panel's jurisdiction.

In the case of the complaint not complying with any of the other mandatory aspects of formality, the complaints coordinator would return the complaint to the complainant, advising of the nature of its informality and inviting them to resubmit the complaint once the informality has been addressed.

All complaints received by the complaints coordinator and judged to be formal in all respects would be forwarded within the prescribed timeframe to the chair of the relevant Independent Councillor Conduct Review Panel for processing. Provided they are formal in all other respects, any anonymous complaints received by the complaints coordinator would be forwarded to the panel chair for determination as to whether sufficient information and grounds exist to accept the complaint for review.

In this way, any suggestion of the general manager either directly or indirectly, being able to influence the complaints coordinator, or to determine the direction of the complaint assessment process is removed. A fully independent process is put in place from initiation.

7.12 Preliminary assessment

Procedures currently in place for conducting preliminary assessments of complaints could still apply. Necessary adaptations could be made to accommodate the changes to the framework relating to removing the general manager from the process and otherwise to clarify the assessment criteria as they relate to the new classification of conduct types. The assessment outcomes will generally remain as at present:

1. decline to investigate
2. frivolous and vexatious
3. lack of substantiating information
4. Informal resolution:
 - a. facilitated by the panel chair or nominated conduct reviewer
 - b. referred to mayor/general manager to resolve informally
5. refer for investigation
6. refer to ICAC or another agency.

There was a common theme among submitters that informal resolution should be pursued wherever possible. The proposed new framework does not seek to devalue that option and indeed mayors and councillors should be encouraged to settle any inter-personal differences before they get to the complaint stage. Part of the education process should include conflict resolution strategies and mayors in particular should play a leadership role in initially mediating conduct issues between councillors to avert formal complaints.

7.13 Investigations

The current Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW include guidelines that provide a general basis for establishing uniformity of process for conduct reviewers in the investigation phase. These procedures will need to be reviewed to accommodate the removal of the general manager and councils from the process and align with the new framework of conduct classification types.

Ideally, the procedures should be restructured to separate out the practice guidelines into uniform investigation practice guidelines, which should also include standards for identifying, recording and evaluating evidence to be used in drawing conclusions from the investigation. The guidelines should also include more specific practice notes, including examples and case studies bearing on the exercise of natural justice principles during the investigation.

Any other improvements that would assist in establishing the validity of the investigation and its conclusions if tested in court should also be considered.

Useful models are already available in various internal procedure manuals available to the OLG investigations team, which could be adapted as described above for guidance of the panels.

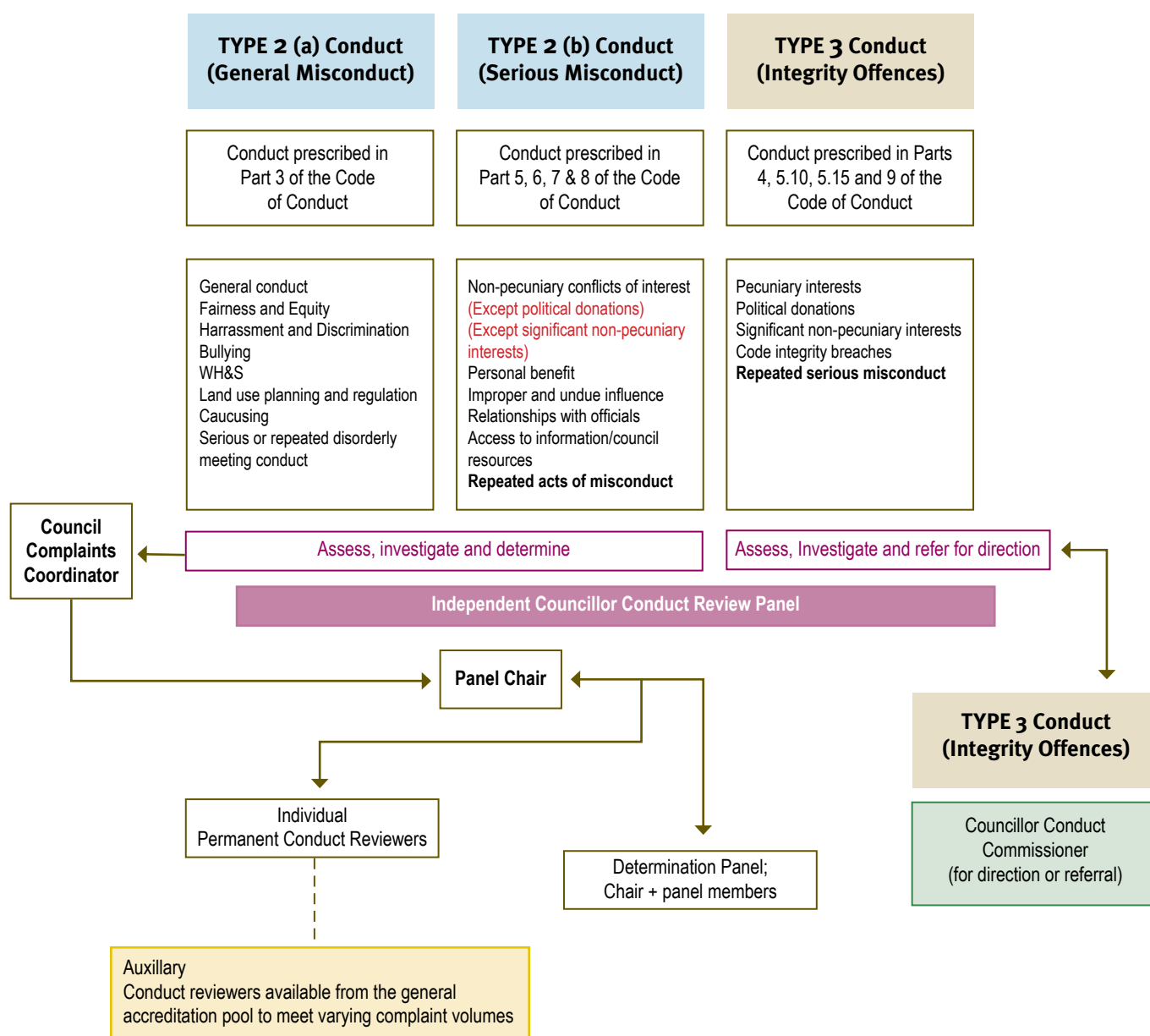
7.14 Jurisdiction

The interaction and balance of jurisdictions will be key to the efficiency of the new framework. Ideally, it will optimise the resources available to deal with relevant classes of conduct at the appropriate level to best deliver timely, equitable and cost-effective outcomes. This balance should also reduce the volume of complaints flowing between jurisdictions. The strategy for achieving this is:

- Confining Type 1 disorderly conduct issues to the meeting forum and the responsibility of the mayor/meeting chair to manage summarily.
 - Complaints about meeting conduct received by complaint coordinators should be rejected as administratively informal. Containing these complaints to the meeting forum should reduce considerably the volume of minor matters entering the formal complaints review system.
- Delegating full authority to panels to assess, investigate and issue determinations and penalties for Type 2 (a) and 2 (b) conduct in accordance with the proposed schedule of councillor conduct standards and associated enforcement options.
 - The panel's decision in respect of these matters would not require authentication by the council or the Commissioner, subject to normal processes where aggrieved parties have rights to appeal the action to NCAT. Aggrieved parties may also seek recourse to the Commissioner regarding the determination of the panel, only where questions of lack of natural justice are involved or there is some question as to the performance of the panel in handling the complaint.

- Where conduct complaints are received directly by the OLG or the Commissioner, they should be referred to the council complaints coordinator for administrative review and referral on to the panel as appropriate, with the complainant being advised accordingly.
- Assigning responsibility to panels for preliminary assessment and investigation of Type 3 Conduct, to establish the level of substantiation for the complaint and whether the matter is of such a nature it requires the attention of the Commissioner. As these complaints might be expected to involve more serious conduct attracting higher order penalties, the investigation report should be submitted to the Commissioner for direction. That is, subject to consideration of the report, the Commissioner may decide the matter is one attracting an outcome within the panel's jurisdiction, and return the report to the panel for actioning. Alternatively, subject to consideration of the report, the Commissioner may determine the matter is one attracting an outcome within the Commissioner's jurisdiction and, having assessed the report, convene a meeting of the Commissioner's Determination Panel to determine the outcome in accordance with the Commission's jurisdiction. Subject to their deliberations, the Commissioner might also refer the matter to ICAC or another relevant agency for action.
- Where a panel encounters repeated breaches of Type 2 conduct and considers that higher order penalties should be considered, the panel may refer the matter to the Commissioner, together with the relevant reports, for direction in the same manner as described above.

Independent Panels - Jurisdiction



7.15 Outcomes

Although councils will be removed from choosing the method and vehicle of complaint assessment and investigation their role in complying with the outcome of conduct investigations needs to remain. In other words, having completed an investigation observing required natural justice practices, and having determined the appropriate outcome, the Independent Councillor Conduct Review Panel would provide its report and determination to the council together with any orders or directions requiring action by the council or the subject councillor.

It is envisaged that this report would be included in the agenda for the next council meeting and form part of the record in the Minutes for public accountability purposes. Any publication and report would need to be consistent with confidentiality provisions and case law. The Council would not be empowered to decline to implement any orders or directions contained in the report.

Orders or directions might include requiring the subject councillor to apologise, be censured or counselled, undergo training, be suspended or other actions or penalties within the panel's jurisdiction.

7.16 Complaints about general managers

Under the current framework complaints about alleged breaches of the employees code of conduct relating to the council's general manager are dealt with in a similar fashion to those relating to councillors, with necessary adaptations. That is, where an investigation is deemed necessary the matter is referred by the council's complaints coordinator to an independent conduct reviewer for report. The consequent report is submitted to the council for consideration and determination in accordance with the council's performance management system as it relates to the general manager or their employment contract.

It is proposed to retain that process under the new framework by requiring the council's complaints coordinator to refer such complaints to the Chair of the Independent Councillor Conduct Review Panel. The panel chair would then give directions as to preliminary assessment and investigation as appropriate, by one of the panel's conduct reviewers and to provide any resulting report to the council complaints coordinator to submit to the council for implementation.

7.17 Timeframes

A common topic among submissions was the timeframe taken to assess and investigate councillor conduct complaints.

In particular, submitters were concerned at:

- the length of time taken by general managers and/or complaints coordinators to acknowledge receipt and/or refer the complaint to a reviewer.
- the length of time taken to deal with complaints (whether by independent conduct reviewers or the OLG) where the subject councillor remained active in council meetings and exhibiting or repeating the same conduct on which the complaint was based
- the opportunity provided in the current processes for both complainants and councillors accused of conduct issues to invoke delaying tactics and obtain extensions of time in an effort to avoid timely determinations
- excessive use of the 'natural justice' theme to frustrate the investigation
- inordinate delays in investigating some cases, which were detrimental to either the complainant or the subject councillor in validating their position.

While the current model procedures set reasonable referral times for the initial steps in a conduct complaint process, the execution of a review plan or investigation program should consider how delays are to be addressed, and the circumstances under which a matter should proceed to determination, even if one of the parties has not responded to information requests or procedural requirements.

The current procedures already permit conduct reviewers to decide to progress to a determination notwithstanding that parties have not responded to requests for information or submissions. However, in practice, there seems to be a reticence on the part of some reviewers to be decisive in such matters and there is no audit process to monitor timeframes and intervene in unresolved cases.

The timeframe to complete a complaint should be mindful of the collateral consequences of protracted processes for those under the cloud of unproven allegations as well as the credibility risk for the conduct reviewers or investigators where complainants or subject councillors are seen to be 'gaming the system'.

The proposed new procedures and the uniform investigation practice guidelines should be designed to permit (and require) expeditious conclusion of complaints commensurate with fairness and natural justice. Mandated milestone timeframes could be set for reviewing progress on complaints that are becoming protracted.

A number of submitters were particularly critical of the timeframes experienced in matters under investigation by the OLG. While it might be expected that the nature of complaints escalating to the OLG would be more serious and complex, timeframes extending from six to twelve months or more are inordinate. Such matters should be the subject of periodic audit and timely intervention to maintain momentum.

The new code of administrative practice should provide guidance on investigation completion timeframes when adequate opportunity has been given to a respondent to submit.

The new uniform investigation practice guidelines should provide consistency for situations where the process is becoming protracted.

RECOMMENDATIONS

XXXIII. That the framework for councillor conduct accountability be restructured as follows:

- a. Require complainants to submit complaints using a prescribed complaint form supplying all relevant information to assist assessment of the complaint.
- b. Establish jurisdictions for dealing with councillor conduct complaints as follows:
 - i. Mayors/meetingchairs
 - ii. Independent Councillor Conduct Review Panels
 - iii. Councillor Conduct Commissioner
 - iv. NCAT
 - v. ICAC and other agencies
- c. Adopt a schedule of councillor conduct and jurisdictional enforcement options to underpin authority of the various jurisdictions involved in the framework.
- d. Remove current powers and functions of council general managers to process and/or determine any matters associated with councillor conduct complaints.
- e. Create powers for the council complaints coordinator to receive and refer correctly lodged complaints concerning councillor conduct for referral to the relevant Independent Councillor Conduct Review Panel, as outlined in Section 7 of this report.
- f. Remove current powers and functions of councils to determine outcomes associated with councillor conduct complaints.
- g. Create Independent Councillor Conduct Review Panels for the assessing, investigation and determination of councillor conduct complaints, including making orders for sanctions and penalties, as outlined in Section 7.6 of this report.
- h. Assign local governments to the jurisdiction of specific panels according to a process to be developed in consultation with appropriate Sector stakeholders.
- i. Recruit appropriately qualified personnel as chairs and conduct reviewers to panels with panel chairs and members to be appointed by the Minister in consultation with appropriate Sector stakeholders.

XXIII. That the Procedures for the Administration of The Model Code of Conduct for Local Councils in NSW 2020 be comprehensively reviewed to align with the proposed new framework for councillor conduct accountability as outlined in this report.

XXIV. That a system of procedural directives for Independent Councillor Conduct Review Panels be prepared by the Commissioner to enable the Minister to manage the operational environment of the Panel system for consistency and responsiveness to sector needs.

XXV. That the Commissioner be required to maintain a central register of councillor conduct complaints and their management through the proposed framework, including for transparency, publishing appropriate details on the Commissioner's website.

XXVI. That separate uniform investigations practice guidelines be compiled to guide panel investigations into councillor conduct complaints as outlined in Section 7.11 this report

XXVII. That criteria and procedures be created for the referral of matters from the Councillor Conduct Commissioner to the OLG concerning implications of individual councillor conduct for the effective performance of a council.

XXVIII. That a detailed implementation plan for the introduction of the proposed panels be made a priority for the Councillor Conduct Accountability Framework Implementation Task Force referred to in Section 11 of this report.

XXIX. That the integrity of the Independent Councillor Conduct Review Panels jurisdiction be assured by according appeal rights to aggrieved parties only on the basis of denial of natural justice and through the usually available recourse to NCAT with complaints about panel procedural performance being referred to the Commissioner for consideration.

8. DISCIPLINE AND DETER

A topic attracting considerable comment during the consultation phase of the review was that of the array of penalties that should be available to apply to councillors who breached the code of conduct. There was a high level of opinion among submitters that penalties for conduct offences needed to be reviewed and restructured, including being strengthened where appropriate.

Those submitters not supporting increased disciplinary powers for councils tended to have concerns about political influence in the local decision making.

Depending on the submitter's particular perspective, or the context of their local government, there was a variety of views offered as to the extent of power that should be available to discipline councillors for conduct breaches and who should exercise that power. While a number of submitters supported increasing penalties, at least for more serious offences, some expressed concern at permitting councils to exercise that power themselves, preferring the OLG or an independent body to apply the penalties.

Local Government NSW also held reservations about placing councillors in the position of 'judging their peers' when it came to invoking penalties. Others perceived that any sanctions greater than censure should be managed by the OLG or some independent means to remove them from the council political environment.

Since the Cornish case resulted in a retreat from applying anything but a 'censure' to councillor conduct breaches, when dealt with by the local government, there has been an increased cynicism among local governments and their communities about the perceived 'toothless' nature of the councillor conduct accountability framework. Most submitters favoured a return to the penalties available prior to the Cornish case, but again there were some with reservations that those powers should not be exercised at council level.

The question of enforcing apologies generated some debate. Many submitters felt that under present arrangements, apologies were not taken seriously. A number of the submitters believed that apologies should remain as part of the conduct process and that additional requirements should be put in place to make them meaningful, transparent and enforceable. There were different views held about the detail of how that should be applied.

The range of sanctions and penalties seen as appropriate for low to range breaches included:

- apology
- censure
- counselling
- training
- removal from a committee or other representative body.

For more serious breaches, there was a view among some submitters that any sanctions greater than censure should be managed by the OLG or some independent means.

Suggestions included:

a) harsher penalties, if available, should only be managed between the conduct reviewer and the OLG, not councils.

b) serious matters should only be considered by a non-council entity.

c) the OLG, or some independent body, not councils, should enforce disciplinary actions, by including:

- increased penalties for multiple breaches
- loss of allowances, exclusion from meetings, suspension from representative positions for up to three months.

It was pointed out that under the present framework pecuniary interest and significant non-pecuniary conflicts of interest carry the same consequences, although the former is viewed as more serious

Submitters in favour of additional disciplinary powers were varied in their suggested approaches to achieving this, although there was a strong opinion that penalties for serious or repeated breaches should be increased. While some suggestions focused on direct additional powers for councils, others sought to confer powers on conduct reviewers or an independent body to determine and action investigation outcomes.

Above all, the common consideration was to have clarity about what constituted a breach of the code of conduct and what would be the appropriate sanction or penalty for each type of conduct. That way, the range of penalties from minor indiscretion to serious integrity breach were known and understood, not only by councillors but by the public and the agency empowered to enforce them.

8.1 Codifying enforcement

As mentioned in Section 3.7 of this report, the classification of conduct types is a key move in providing clarity and certainty in the councillor conduct accountability framework. An essential extension to that is the declaration of what range of penalties should apply to breaches of those various types of conduct standards.

Given the proposed focus on Independent Councillor Conduct Review Panels, the compilation of a defined schedule of councillor conduct standards and jurisdictional enforcement options is proposed. That schedule could be promulgated under regulation and comprise information as to:

- conduct class heading
- description of the conduct standard for that class and the legislative source of its specification
- the jurisdiction that has authority to deal with breaches of the standards
- the range of enforcement options available to the adjudicator
- the avenue of recourse (if any) from the adjudicator's decision.

An example of the schedule proposed for consideration is provided at **Attachment D**.

It is clear from the consultation there is a view that additional and more appropriate options should be available to enforce councillor conduct standards. To that end, a range of options is offered, for consideration in the formulation of the proposed schedule. The final schedule of penalties should be determined during the comprehensive review of the administrative procedures and jurisdictional allocations.

8.2 Deterrence

Commentary by submitters about penalties included criticism that the current available enforcement options, combined with a perceived reluctance on the part of conduct reviewers, the OLG and NCAT to invoke stronger penalties, was failing to be an effective deterrent to poor councillor conduct.

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

Under the misconduct provisions of the Local Government Act, if a breach is particularly serious, the OLG may refer councillor misconduct to NCAT for disciplinary action following investigation.

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

The consultation paper prepared for the review stated:

'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 nine 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).'

NCAT has taken the following disciplinary actions against councillors during this five-year period:

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

Decisions by 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 NCAT to take disciplinary action against a councillor has been overturned on appeal (*Cornish v Secretary, Department of Planning, Industry and Environment*).²⁰

Information available from the OLG reveals that in recent years the sanctions imposed by NCAT for councillor misconduct have not been at the higher end of the suspension scale. Furthermore, the disqualification sanction has only been imposed twice in the history of the misconduct legislation. In both of those cases, the disqualification was not imposed as a result of the seriousness of the conduct – one matter involved the “three strikes” rule and the other involved a former councillor where a period of disqualification was imposed as suspension was unavailable. Councillors can resign to avoid findings and possible sanctions such as suspension.

8.3 Interstate comparison

Adjunct Professor Graham Sansom, in his research report noted:

*'There is an evident trend to enabling panels to impose stiffer penalties for 'mid-range' breaches, including suspension for up to 3 months (Qld, SA, Tas) or as much as 12 months (Vic). In all jurisdictions councils themselves (in Vic, through the appointed arbiter) may order training or counselling, and in some cases censure the councillor concerned or require a public apology. In Qld, SA and Vic (again through the arbiter) councils may order various forms of short-term suspension, exclusion from specified meetings or loss of status (eg as a mayor/committee chair, representative on external bodies, or right to stand for such positions in future).'*²¹

Some jurisdictions have introduced monetary penalties in the form of substantial fines for such breaches as failure to register or declare interests or non-compliance with panel orders.

Others have sought to place accountability on the subject councillor for the cost of dealing with the complaint. Submitters to this review did not tend to support this approach, generally on the basis that:

- a. such action may not be equitable where the councillor concerned may not have influenced the extent of the investigation and its subsequent cost
- b. it may create an unwanted side-effect of dealing with councillors who refused to pay and thus generate more time and cost in pursuing the debt.

20 Review Consultation Paper P16-17

21 Sansom P5

This latter response tended to be made in the context of councils being required to recover the cost. There may be a different view when the order for recovery is made by an Independent Councillor Conduct Review Panel and the consequences of disobeying that order are further misconduct actions.

8.4 Repeat offenders

Concerns about councillors who repeatedly breach aspects of the code were raised by a number of submitters. There was a view that councillors who receive only light admonishment for their conduct were inclined to re-offend with little regard for the consequences, which they held in contempt.

Current procedures permit conduct reviewers to take into consideration the record of the subject councillor in relation to previous complaint outcomes. However, some formal avenue of recognising repeat offences in the determination of penalties should be considered.

An example of a graduated approach to repeated breaches is available in the Investigations Policy of Logan City Council in Queensland. The following formula is used to apply appropriate penalties to first, second and third offences.

Order	First instance engaging in inappropriate conduct	Second instance engaging in inappropriate conduct	Third instance engaging in inappropriate conduct
No action to be taken against the councillor	✓		
The councillor make a public admission that the councillor has engaged in inappropriate conduct	✓*	✓*	✓*
A reprimand be recorded against the councillor for the conduct	✓#	✓#	✓#
The councillor attend training or counselling addressing the councillor's conduct		✓#	✓#
The councillor is removed or must resign from a position representing the local government other than the office of councillor			✓
If the councillor engages in the same tpe of conduct again, it will be treated as misconduct	✓^	✓	
The councillor reimburse the local government for all or some of the costs arising from the councillor's inappropriate conduct***	25% of costs ¹ 35% of costs ²	50% of costs ¹ 60% of costs ²	100% of costs

*** Costs arising from the councillor's inappropriate conduct includes investigative costs, legal costs and support costs.

* May be appropriate where there is heightened or particular public interest in the type of conduct or the subject matter relating to the conduct.

May be particularly appropriate where the conduct involves bullying or harassment or making inappropriate comments about another person.

^ For more serious and deliberate inappropriate conduct by an experienced councillor.

¹ Where the conduct was accidental rather than deliberate or reckless; the councillor has demonstrated insight into the conduct; the councillor cooperated with the investigation.

² Where there has been previous inappropriate conduct by the councillor; or the conduct was reckless or deliberate; or the councillor has not demonstrated insight their conduct; or the councillor has failed to cooperate with the investigation or the councillor is an experienced councillor; or the councillor has had the benefit of relevant training but still engaged in the conduct; or the impact of the conduct (financial and reputational) on Council or others is significant.

A similar mechanism could be placed in the proposed schedule of enforcement options and the procedures for Independent Councillor Conduct Review Panels to give guidance and consistency in the ordering of penalties.

RECOMMENDATIONS

XXX. That the proposed Independent Councillor Conduct Review Panels be provided with guidance as to the range and extent of penalties to be ordered within their jurisdiction, including guidance as to the determination of penalties for repeat offenders. The adoption of a schedule of Councillor Conduct and Jurisdictional Enforcement Options similar to that shown in **Attachment D** should be considered.

XXXI. That more rigorous application of available penalties be adopted commensurate with the seriousness of conduct offences to act as deterrent to misconduct.

XXXII. That the maximum period of suspension from meeting attendance or from official duties be increased for more serious or repeated conduct breaches.

XXXIII. That in addition to existing penalties, monetary penalties be introduced for certain integrity breaches such as failure to register or declare pecuniary or substantial conflict of interest.

XXXIV. That partial or full cost recovery from councillors be introduced where they are found to have committed repeated misconduct or integrity breaches or have contributed to unnecessary prolongation of the investigation.

9. DIRECT, AUDIT and INTERVENE

Key functions for an oversight agency associated with the councillor conduct accountability framework include:

- Direct: advise, instruct, order to enforce accountability.
- Audit: test compliance, measure performance, assure quality of outcomes.
- Intervene – act to correct or realign actions or outcomes inconsistent with standards.

Under the current councillor conduct accountability framework, the OLG has roles of initiating legislation, providing guidelines and model codes and advice to councils on administering the code of conduct. The OLG also exercises powers of substantive investigation of councillor conduct issues from complaints lodged directly with OLG, on referral from councils and from conduct reviewers or on the OLG's own initiative.

The OLG's participation in active councillor conduct cases can result in orders invoking penalties for individual councillors and, depending on the circumstances, corporate interventions by way of performance improvement orders. In the case of a general breakdown in governance due to councillor conduct, the OLG's Chief Executive may exercise other powers and even advise the Minister on dissolution of the council.

9.1 Direct

The OLG currently has primary oversight of the councillor conduct accountability framework through its legislative and directory powers. The OLG may recommend the promulgation of subordinate legislation through regulation to establish model codes and procedures and also issue various guidelines and draft policies to help local governments implement their responsibilities under the framework. The OLG also has power to issue practice directives for various matters, but this avenue has not been used to any extent in the councillor conduct review context, other than in the form of suggested approaches contain in OLG Circulars.

Under the proposed new framework the role to direct is intended to be assigned to the Councillor Conduct Commissioner, created under the legislative umbrella of the Local Government Act, but exercising independent decision-making. The aim is to provide an increased focus on providing the legislative foundation for the Commissioner's oversight of the new framework with sufficient authority and power to exercise the various mandates proposed under the new arrangements.

This will also provide the necessary procedural environment for the panels' operation, including standards for the uniform investigation practice guidelines. Refreshing the Model Code of Conduct for Councillors and the Model Code of Meeting Practice will be an important task for the Commissioner as will be the establishment and management of the schedule of conduct standards and enforcement options.

The introduction of the Independent Councillor Conduct Review Panels will remove any substantive direct conduct investigation action required by the Sector Performance and Intervention Directorate of OLG in relation to individual councillors. However, there will still be a role for the

Directorate in dealing with matters referred for review from the Councillor Conduct Commissioner in relation to more serious conduct issues. Enquiries and considerations preparatory to other reasons for intervention would also be a continuing focus for that Directorate.

The principal objective for OLG through partnership with the Councillor Conduct Commissioner should be to divest itself of the volume of minutiae of low-level councillor conduct complaints and to concentrate on establishing, monitoring and continuously improving the sector's overall performance. Setting the parameters and standards for operation of the panel framework and monitoring its performance should be the Commissioner's priority, with a view to even minimising the need for the Commissioner to intervene in individual councillor conduct complaints.

Recruiting, training and advising panel chairs and conduct reviewers should be part of the Commissioner's role in quality assurance.

In terms of the original principles of this review that means:

- simplifying and streamlining processes
- providing certainty and consistency of application
- ensuring timeliness of response
- providing independence and equity in outcomes.

9.2 Audit

Having established the standards by which Independent Councillor Conduct Review Panel chairs and conduct reviewers are selected and the procedures by which panels are to operate, the Councillor Conduct Commissioner's role should be to measure the performance of the panels and provide support and assurance of the quality of outcomes delivered by the model. This again is another critical aspect missing from the current framework.

The audit role should not be interpreted as 'supervision' with the result being minimal additional administrative oversight. Establishing performance criteria for the panels with regular reporting against appropriate and practical indicators will enable the Commissioner to monitor the effectiveness of the new framework and respond to any need for skill development amongst chairs and conduct reviewers.

An important indicator of the success of the new panel system will be the movement in the general volume and nature of complaints. To date, the OLG has not had high visibility of the data that reflects complaint activity within local governments across the state. The current requirement for local governments to report complaint statistics annually has not provided sufficient industry intelligence to enable the OLG to be proactive in addressing emerging conduct issues. Regular reporting from panels to the Commissioner, which will be the point where complaint data converges, will help the Commissioner analyse and respond to trends in complaint generation.

This will not only allow effort to be concentrated on councils facing particular conduct challenges, but also assist the continuing development of legislation, policies and procedures relating to the issues identifiable in the trends. This knowledge management focus will also permit the Commissioner to recommend any refinements of the

panel distribution and resourcing as complaint numbers and complexity vary between council groups. Sharing this knowledge with the OLG will provide important insights for that agency's functions related to sector performance and capacity building.

An important and critical consideration in this respect is the current absence of an effective automated case management information system available to the OLG. Even under the current framework, this is a distinct disadvantage to the OLG in collecting, analysing and using informational intelligence, not only about the actual complaints management process but also the sector environment generating those complaints, allowing appropriate responses to be planned and delivered.

With the introduction of the proposed panel framework, the availability of such a system will be essential not only for the Commissioner and the OLG but for the panels to operate in the most effective way possible. Having the case load of panels managed on the same information system as the Commissioner and the OLG, subject to appropriate security and privacy considerations will provide significant advantages of integration and information sharing and enable the Commissioner to much more efficiently carry out their oversight role. The investment in such technology will be recovered many times over through process efficiency and knowledge management benefits.

9.3 Intervene

The new framework will eliminate the demand for the Sector Performance and Intervention Directorate of OLG to actively participate in substantive investigations of individual councillor conduct complaints. This should allow the resources currently committed to those investigations to be diverted to higher value analysis of more critical issues likely to warrant intervention to realign council corporate and sector performance with expected standards.

It must be recognised that the OLG has a very wide brief concerning local government and operates across that brief with very limited resources. Councillor conduct is only one of many focus areas.

The Investigations Team comprises only 5 line investigators, whose ambit includes supporting public inquiries involving local governments. The proposed new framework will alleviate the individual councillor complaint caseload for this unit but its other higher value responsibilities will probably easily fill that gap.

Investigation capability will also underpin the assembly of evidence to assist any performance interventions involving local governments. A strong collaborative relationship should be encouraged between the OLG Investigations Team and the other units of the Sector Performance and Intervention Directorate to further this role.

In the context of councillor conduct accountability, the Sector Performance and Intervention Directorate should also identify opportunities to leverage its appointment of advisors as a 'soft' intervention to help councils (mayors and committee chairs in particular) maintain a suitable environment in which elected member work constructively for their communities.

9.4 Interstate comparison

The Sansom report observes:

'No other state agency has been given the extensive role and authority [in councillor conduct matters] as exercised by the NSW OLG – notably its heavy involvement in dealing with and determining mid-range complaints, as well as investigating the most serious breaches, its right to intervene (as opposed to assist) in lower-level matters being handled for councils by reviewers, and its power to impose penalties. These features evidently flow from the lack of an independent 'triage' function and of a statutory panel to handle mid-range misconduct.

As a general rule, the equivalent agencies (and their chief executives) elsewhere are largely limited to overseeing the system and supporting and advising the Minister as required. In addition, in NT, Tas and WA (pending the proposed establishment of an Office of the Local Government Inspector) the agency may become involved in investigating – but not determining – the most serious offences that involve an offence under the Act or a referral to the SAT. In Vic the agency also appoints and resources the Principal Conduct Registrar, and in WA it supports the Standards Panel, but in neither case does it make determinations.

In NT and SA a significant amount of the workload is outsourced to the local government association, and in WA the LGA provides considerable support in terms of training and producing template local laws.

*As noted earlier, in SA Integrity matters are handled in the first instance by the Ombudsman, who carries a responsibility that might otherwise rest with the SA OLG.'*²²

Throughout this report, the perspective of comparison with interstate jurisdictions and their approaches to councillor conduct accountability in their own contexts has been both informative and valuable. There would seem to be ongoing value in encouraging a continuing relationship of information sharing between state agencies so that progress might be made toward a common national framework. A regular forum of agency representatives should be considered for this purpose.

9.5 OLG resourcing

In addition to the wide range of framework issues raised in the submissions to the review, numerous submitters referred to concerns that the OLG was inadequately resourced to cope with the responsibilities conferred on it in the context of the current councillor conduct complaints environment.

As addressed elsewhere in this report it is not considered that merely adding additional resources of the same kind to the existing framework will provide an acceptable solution to the challenges faced. A more holistic approach is necessary.

However, even the reforms proposed to the overall framework will not obviate the need for a general re-assessment of the OLG resourcing issues as they relate to the broader remit of that office. While it is envisaged the proposed reforms to the councillor conduct accountability framework will considerably reduce the burden of minutiae on the OLG, particularly in relation to individual councillor conduct investigations, the impact of other influences involving inquiries and performance intervention responsibilities, including sector capacity building needs to be reassessed.

From information available it is ascertained that the current composition of the Investigations Team was determined in 2012. Since that time there has been the introduction of additional intervention powers and an increase in use of misconduct investigations.

The Investigation Team currently uses the Objective filing system. It does not have a case management system which significantly impedes the team's ability to access various data fields. This limits the effective allocation of resources, and leads to increased timeframes, and inability to measure performance, to identify emerging trends and provide meaningful statistical reports to inform management briefing documents.

The lack of such a system has resulted in the Investigation Team being unable to provide much of the information requested for the review.

RECOMMENDATIONS

XXXV. That appropriate protocols for the interface of the Councillor Conduct Commissioner and the OLG be developed to ensure close cooperation in implementing the proposed new framework.

XXXVI. That urgent consideration be given to providing OLG and consequently the Commissioner and proposed Independent Councillor Conduct Review Panels with an effective automated case management and knowledge management system.

XXXVII. That the councillor conduct accountability framework be underpinned by greater data gathering and analysis of sector experiences to provide accurate reporting of conduct review outcomes and to inform ongoing initiatives for both preventative and responsive action on conduct issues.

XXXVIII. That the councillor conduct reporting period be realigned to financial years to enable gathering of financial data concerning the cost of conduct reviews and improved management of the overall framework in terms of budget performance.

XXXIX. That the arrangements for accreditation of councillor training programs and ongoing education of councillors be further defined and resourced, with options for partnerships between the Commissioner and appropriate Sector stakeholders in the design and delivery of courses being explored.

XL. That the proposed Councillor Conduct Commissioner develop criteria and processes for the recruitment and appointment of Independent Councillor Conduct Review Panel chairs and panel members as outlined in Section 7.4 of this report.

XLI. That the proposed Councillor Conduct Commissioner consider an initiative to join with similar agencies in other states and the Northern Territory to establish an annual forum of discussion on the topic of councillor conduct accountability for the purposes of knowledge sharing and cooperation.

10. ASSURE EQUITY

The consultation paper states:

'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 the 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
- that the conduct reviewer has misinterpreted or misapplied the standards of conduct prescribed under the council's code of conduct
- 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, the 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, the OLG may direct the council to reconsider its decision.'*²³

A number of submitters raised issues about the procedures for assuring natural justice in the investigation and determination processes.

There were concerns from both side of the questions. Some felt the opportunities for subject councillors to effectively present their cases were inadequate, while others felt that complainants were not accorded sufficient rights to present their evidence. Questions about the handling of confidentiality were also raised both from the point of view of the complainant and the subject councillor.

Without interrogating each of the individual case studies from which these submissions arose, it can be generally deduced that the previously mentioned variability in procedure between councils and conduct reviewers could have an influence on these perceptions.

Proposals from this review to address matters of uniformity of approach through the Independent Councillor Conduct Review Panels and uniform investigation practice guidelines should result in more consistent outcomes in terms of natural justice standards experienced by the parties to a complaint.

Appeals or reviews on the grounds of some minor procedural lapse should not be allowed to weigh down the framework. Any concerns in individual cases about the performance of an Independent Councillor Conduct Review Panel or its conduct reviewers should be addressed by a simple process of complaint to the Commissioner who will deal with the matter under their responsibilities for assuring the quality of the panel system.

10.1 Questions of appeal rights

The consultation paper sets out the various aspects of appeal avenues in the current framework.

Of the 18 submitters suggesting appeal rights against council decisions on conduct matters (should additional disciplinary powers be extended to councils), about half supported appeal to the OLG. Some felt there was also a need to address some structural or resourcing issues for the office. The remainder of the views were evenly divided between an appeal avenue to a separate tribunal or agency and direct appeal to NCAT. The latter view was supported by the argument that the OLG already had an oversight role of both council decisions and outcomes from conduct reviewers' investigations.

The tenor of some of the submissions received was that the OLG provided more opportunities to challenge conduct review outcomes than was reasonable, particularly in circumstances of relatively minor matters thus adding to inefficiency and delays in the finalisation of complaints.

In 2021/22 the OLG received twelve requests to review conduct complaint outcomes from referrals to conduct reviewers. Most of the requests were made by complainants in response to decisions by the general manager or a conduct reviewer to decline or informally resolve the complaint. One request involved a respondent aggrieved at the council's decision to censure them.

In the consultation paper, the OLG stated:

*'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.'*²⁴

Reports of the reviews undertaken in recent times indicate that a number of those cases referred for review have in fact required revisiting the merits of the substantive matter because, in the OLG's opinion, the conduct reviewer did fail in some respect to comply with the prescribed procedures.

This reinforces the views expressed earlier in this report concerning the need for a new approach to assuring the quality and integrity of the review process and the competence and skill of independent conduct reviewers.

The importance of getting the review, investigation and determination process right is highlighted by the concern expressed by the OLG in the consultation paper about the impact of quality assurance processes on the introduction of stricter penalties.

*'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.'*²⁵

Setting thresholds for appeal rights may need additional consideration in the implementation plan for the new framework. Those thresholds should align to consequences for the integrity of local government decision making if imposed on a councillor.

In other words, the greater the risk of the council's decision-making being prejudiced by the penalty imposed, the greater avenue for appeal should exist.

For example, penalties associated with minor conduct infringements which attract censure, counselling, training, apologies etc. raise no consequences for decision-making integrity and therefore should attract low levels of recourse, other than on natural justice grounds. To give councillors opportunity to challenge even a small sanction, it should be sufficient to enable them to do so through a complaint to the Commissioner about the panel's processes. The Commissioner could determine the validity of the outcome without needing to re-prosecute all the facts and circumstances de novo.

Mid-range penalties involving suspension of a councillor for a short period may, balanced with the reason for the suspension, attract some avenue for seeking review. For example, it could hardly be argued that to suspend a councillor for proven repeated and serious disruption to council meetings would create a risk to the integrity of council decision-making. Rather it might support greater integrity.

However, a determination resulting in long-term suspension or dismissal of a councillor, even on grounds of serious misconduct, would probably need to attract more formal avenues of appeal.

In any event, the objective should be to concentrate decision-making at the panel level as far as possible commensurate with diligent process and natural justice. Consequently, minimising the demand to deal with appeals other than on denial of natural justice grounds should be pursued, with the default arbiter for such appeals being NCAT.

Issues related to procedural compliance and misinterpretation of standards should be subjected to the audit and quality assurance role of the Councillor Conduct Commissioner so that these causes for review should be minimised or eliminated through the proposed 'determination panel' and 'referral for direction' practices of the new framework.

10.2 Interstate comparison

The Sansom report comments:

'As noted above, the focus in most jurisdictions is on handling all but the most serious breaches as expeditiously as possible consistent with natural justice and procedural fairness. Councils, panels and the Qld Tribunal are therefore allowed to exercise a high degree of discretion in terms of their procedures, and in marked contrast to NSW, there is little prescription of the parties' (and particularly the respondent's) rights to seek/require review loops at various stages during the process – as opposed to appealing the decision at the end.'

*In Tas, appeals against panel decisions may only be made on the grounds of lack of natural justice. Elsewhere various avenues of appeal are specified, except in SA, where the prevailing view is that aggrieved parties have opportunities under other laws to seek redress and there is no need to specify processes under the LG Act.'*²⁶

24 Review Consultation Paper P15

25 Ibid

26 Sansom P5

RECOMMENDATION:

XLII. That the jurisdiction of Independent Councillor Conduct Review Panels be established to deal with councillor conduct complaints as described in Section 7 above and that avenues for appeal against panel decisions be confined to matters of denial of natural justice for submission to NCAT. Other issues questioning the procedural adequacy of a panel's determination should be referred by complaint to the Commissioner.

11. IMPLEMENTATION ISSUES

11.1 Framework cost

Whenever new initiatives in public administration are considered, there is always a concern for the cost to the public purse and the possible impact on existing departmental budgets. It will be the same with the proposed changes to the councillor conduct accountability framework.

In developing the proposals contained in this report, suggestions promoted during the consultation period about new independent state agencies and significant resource increases to OLG have been weighed up against the current cost environment where councils engage independent conduct reviewers and generally carry both the direct costs of those engagements and the internal staff and administrative costs of any assessment and investigation.

As mentioned in Section 2.5 above, the estimated cost to the Sector of the current framework is more than \$3million per year.

Although the proposed Independent Councillor Conduct Review Panel arrangement is based on the currently successful Regional Planning Panels system, the estimated cost of the new framework is expected to be well under the cost of operating those panels. Fewer Independent Councillor Conduct Review Panels are expected to be appointed and not require the extent of technical support required by Regional Planning Panels.

With the entire volume of individual councillor conduct complaints being redirected from the OLG, the saving in the Investigations Team time spent on such complaints can be applied to higher order intervention functions.

The administrative structure required to support the Panels would be expected to be confined to a secretariat sufficient to support the Commissioner's functions and provide administrative capability for the Independent Councillor Conduct Review Panels.

After the initial set up cost, it is proposed that operational expenses of Independent Councillor Conduct Review Panels will be recovered from local governments on a fee-for-service basis. Costs of processing complaints under the new framework will be met by councils referring complaints to the panel, based on the work required in processing each complaint. Economies will be achieved through a significant reduction in the number of complaints required to be dealt with by formal processes.

Other cost saving considerations include:

- Time costs for local governments should decrease, with less time required by general managers and complaints coordinators assessing complaints.
- With meeting conduct matters dealt with summarily by the mayor/chair the numbers of these matters requiring assessment/investigation should reduce considerably.
- The introduction of a mandatory complaint form will reduce time taken dealing with matters that lack relevant details and not related to conduct complaints.
- With minor conduct matters being dealt with summarily by the panel chair, the time cost of general managers and councils having to deal with these should also reduce.
- On a 'user-pays' basis, those councils generating more and complex complaints will pay the higher cost of processing and therefore be accountable for their councillors' conduct.
- Introduction of the panel system will eliminate the need for special complaints management arrangements between councils and OLG further reducing OLG resource commitments.
- Further economies could be achieved if, as discussed in Section 8.4 above, consideration is given to recover of costs from:
 - complainants found to submit repeated frivolous and vexatious complaints
 - councillors committing serious and/or repeated breaches of the code of conduct.
- Those existing provisions empowering the OLG to recover costs could be extended to the Commissioner for more serious and complex matters and more frequently activated as both a cost reduction and deterrent strategy.

Remuneration of chairs/conduct reviewers and charge-out rates would be approved by the Minister to provide certainty of cost structures.

The remaining costs for supporting the officer of the Councillor Conduct Commissioner should be relatively modest compared with the current OLG overhead for investigations.

RECOMMENDATIONS:

XLIII. That the cost of the Commissioner's and Independent Councillor Conduct Review Panels' role in the councillor conduct review accountability framework be recovered as far as possible on a fee for service basis from the local governments using the service.

XLIV. That remuneration of Independent Councillor Conduct Review Panel chairs/conduct reviewers and charge out rates be approved by the Minister to provide certainty of cost structures.

11.2 Implementation management

Implementing recommendations from this review will mean addressing a range of environments that have been subject to a different model for some time. Consequently, it will be necessary to adopt key principles of change management, such as:

- ensuring the objectives of the change are understood and there is a clear plan to guide the change
- providing committed leadership and positive motivation to the change team
- encouraging shared ownership of the new path and a culture of partnership and collaboration
- communicating constantly with all stakeholders
- maintaining momentum and measuring progress
- committing to transparency and accountability
- recognising and celebrating achievements.

Accordingly, the most effective manner of bringing about this form of change will be to establish a dedicated task force to plan, lead, organise, control and validate the several themes presented by the report's recommendations. Coordination of effort and resources will be very important to aligning the various inputs to the new framework to achieve the desired results.

An effective task force structure might comprise:

- the Councillor Conduct Commissioner as task force chair, who will be of reputable standing with the NSW local government sector, who is recognised for their skill in leading multi-disciplinary teams in pursuit of challenging change scenarios, and who will have knowledge or appreciation of machinery of government issues
- a core project team comprising:
 - the Team Leader chosen from the Commissioner's support personnel
 - a representative of the OLG with appropriate knowledge of relevant legislation and systems pertaining to the current councillor conduct accountability framework
 - an external resource experienced in councillor conduct reviews.

This team would be responsible for preparing and managing the implementation plan and developing the various components of policy, procedures and practice guides for the new framework. The team leader will need strong project management skills and an orientation to innovative solutions to circumvent traditional bureaucratic responses. Wide and influential networks within the NSW Government and local government sector will assist their project management.

- a representative sector reference group to provide input into and validation of the progressive development of key elements of the new framework. Representation should be by invitation of the Commissioner from such key stakeholder groups in the local government sector as peak bodies, regulatory agencies and might include NCAT. Consideration might also be given to including appropriate academic representation.

11.3 Implementation approach

The compilation of the implementation plan should focus on an appropriate balance of administrative and legislative reform. Essential planning is required for short-term, medium-term and long-term solutions.

It is recognised that a number of the proposed reforms will require substantive legislative change to enable the required structures and powers to be given necessary authority. However, there are also many aspects that can provide immediate benefit through administrative change alone. For example, priority should be given to achieving early wins in matters that can be improved by 'practice' directives and guidelines able to be given immediate effect by the OLG CEO or the Minister, pending full transfer of powers to the Commissioner.

Other recommendations might be achievable in the short term by leveraging powers exercisable under delegated legislation – regulations, Ministerial orders, the OLG CEO orders.

For example, the current system of council-appointed conduct reviewers could be moved toward the proposed independent panel model by a minor regulatory change requiring councils to choose their conduct reviewers from an interim accredited list approved by the OLG.

With a view to the long term, the implementation plan might also consider developing an ongoing role for the sector reference group in assisting in other reforms of value to local government in NSW.

RECOMMENDATIONS:

XLV. That a dedicated councillor conduct accountability task force be established to implement the recommendations of this Review.

XLVI. That the composition of the task force comprise and the Councillor Conduct Commissioner, a project team and sector reference group as outlined in Section 11.2 above.

XLVII. That the implementation plan have due regard to achieving early benefits through administrative change, while pursuing necessary legislative change.

XLVIII. That in order to minimise any delay in activating the new framework the Minister appoint an Interim Chair to convene the proposed Implementation task force and to advise the Minister on the introduction of necessary legislation and procedural arrangements required to establish the Office of the Commissioner and the framework for the Independent Councillors Conduct Review Panels.

12. CONCLUSION

The issue of the adequacy of the NSW councillor conduct accountability framework has been in debate for some time. In 2015, Local Government NSW commissioned Dr Tim Robinson to conduct some preliminary research to identify whether there were any broad-based issues impacting on the efficacy of the Model Code of Conduct and to suggest options for improvement. Dr. Robinson's report concluded that the following areas needed to be addressed.

- strengthened independence of assessment and investigation regime
- more sanction options more commensurately applied
- clarity and consistency of meaning and its application in practice
- improved standards for conduct reviewers
- improved timeliness of response from the OLG²⁷.

Outcomes from the current review reinforce these views as still weighing the system down.

Notwithstanding continuing minor improvements to procedures and guidelines by the OLG, the central issues remain in need of legislative and structural reform to address the underlying issues of efficiency and effectiveness in dealing with those stubborn sources of less than desirable conduct on the part of some councillors.

Findings of other recent inquiries

As mentioned in earlier sections of this report, NSW has experienced a number of public inquiries involving local governments for various reasons, but during which issues concerning councillor conduct were raised and mentioned in the resulting reports and even featured in recommendations from those inquiries.

Although those findings have not been specifically incorporated in this review, they have been noted and, where appropriately supporting this review's findings, have been embraced.

Attachment E to this report provides a table of the outcomes from those inquiries that relate to matters arising in this review, so that the implementation of this review's recommendations may be informed by those related and reinforcing findings.

The way forward

The various sections of this report provide both an evaluation of the current councillor conduct accountability framework and suggestions as to how an improved framework would be likely to achieve the fundamental objectives of:

- setting clear conduct expectations for councillors in their role as civic leaders.
- providing a system that informs, supports and develops a culture of responsible conduct by local government officials.
- introduces a more simplified and streamlined process of identifying and addressing conduct that departs from expectations.
- creates an independent, consistent and equitable basis for determining allegations of misconduct.
- offers a foundation for better resource utilisation for councils, conduct reviewers and the OLG.

Consideration has been given to the various stakeholders in the framework and the need to balance the various interests operating at all levels.

The resultant recommendations are designed to offer guidance on the implementation of the new concepts while at the same time permitting those charged with the implementation sufficient discretion to adapt the detail to circumstances. The focus however should be to avoid perpetuating those elements that have either given rise to continuing dissatisfaction with the framework or do not deliver on the key principles of simplicity, certainty, consistency, timeliness and independence.

Above all the key performance indicator of the success of the new framework should be the improvement and maintenance of high standards of councillor values and conduct and not the number of investigations and penalties applied.

27 Robinson, Dr. T "Exploring Opportunities to Improve the NSW Local Government Model Code of Conduct and its Operation – A LGNSW Initiative 2015 p21

ATTACHMENTS

Attachment 'A' – List of formal submitters

NSW Council Conduct Accountability Review – List of formal submitters	
<p>Albury City Council Bega Valley Shire Council Berrigan Shire Council Camden Council Centium (Conduct Reviewers) Central Coast Council – Administrator Clarence Valley Council Cr George Campbell (Cumberland Council) Canberra Joint Regional Organisation (regional Organisation) Council Employee – identity confidential Councillor - identity confidential Councillors (2) - identity confidential Development and Environmental Professionals' Association (Employees Association) Eurobodalla Shire Council Georges River Council John Haggard (Private) Wesley Hall (Former Mayor) Independent Commission Against Corruption NSW Information and Privacy Commission Kempsey Shire Council Lake Macquarie City Internal Ombudsman Local Government Professionals NSW Local Government NSW Lotus Cavagnino (Private) Mary Lyons-Buckett (Councillor)</p>	<p>Max Underhill (Private) Mid Coast Council Mosman Council Narrabri Council NSW Ombudsman Andrew Patterson (Consultant & Investigator) Penrith City Council Robbie Pickett (Private) Port Stephens Council Randwick City Council Private Individuals (2) - identity confidential Ryde City Council David Schwarz (private) Shared Internal Ombudsman (Inner West, Parramatta, Cumberland Councils) Small Business Commission John Stamolis (Private) Wagga Wagga City Council Greg Warren MP Willoughby City Council Wingecarribee Shire Council</p> <p>Invited submission: OLG Investigations team</p>

NSW Councillor Conduct Accountability Review – List of Interviews
<p>Mr Viv May PSM – Administrator, Wingecarribee Shire Council Mr Rik Hart – Administrator, Central Coast Council Mr Michael Colreavy – Administrator, Balranald Shire Council Councillor Darriea Turley AM – President, LGNSW Mr Scott Phillips – CEO, LGNSW Mr Stewart Todd, President, Local Government Professionals Mr Ian Robertson - Secretary, Development Environmental Professionals Association Councillor Big Rob – Lismore City Council Mr Reg Kidd – Former Mayor, Orange City Council Ms Sandy Grekas – former Councillor, Georges River Council Former General Manager (Identity Confidential) Public Sector Officials (4) (Identity Confidential)</p>

Attachment 'B' – Summary of submissions

INTRODUCTION

The following summary is presented by topic heading as set forth in the consultation paper and to which the majority of submitters aligned their submissions.

No attempt has been made to weight the suggestions according to the number of submitters supporting them. This is because a suggestion's worth to the improvement of the system is not necessarily increased by the number of supporters and equally a suggestion may be eminently worthy of consideration even though mentioned by only one submitter.

All submissions and suggestions however were considered in the review arriving at its conclusions based on many factors not just the submissions.

CODES OF CONDUCT

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

Of the 45 submitters, 15 offered no comment on this issue. Seventeen submitters felt the current options were adequate. However, the current arrangements allow for councils to opt for two models – combined or separate. This led to some of these submitters offering divergent opinions as to whether they were confirming the single Code or the option to choose. Thirteen of these submitters affirmed their opinion that a single Code of Conduct for councillors and officers should be applied, for consistency whereas 3 submitters felt having the option available to councils was appropriate. One council submitter advised that while their officers supported a single Code their councillors supported a separate Code for councillors.

Thirteen submitters thought that separate codes would assist in emphasising the different roles of councillors and staff or volunteers and would enable a clearer focus on those roles in applying the Code and providing appropriately focused training in its provisions.

STANDARDS

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

Of the 45 submitters, 23 offered no comment on this issue. Eight submitters felt the current standards were adequate, although four of these recommended that they be strengthened or made easier for consistent application by OLG providing clarification through administrative guidelines and examples of how the standards should be applied in practical case studies.

Fourteen submitters suggested changes or improvements to the standards. The following is a summary of the suggestions:

a) More clearly define the 'nature and gravity' of misconduct which results from failure to observe the desired standards. Clarify the standards by category associated with the severity of breaches and the related sanctions.

b) Differentiate unacceptable behaviour from the robust debate reasonably expected in the local government political environment.

c) Avoid defining behaviour as a 'laundry list' of misdemeanours.

d) Address the generality of Part 3 of the Model Code of Conduct to better clarify expectations.

e) Reintroduce terms such as 'respect' and 'tolerance' as standards to be observed.

f) Extend the standards to the area of 'influence over decision-making' as opposed to strict pecuniary interest and require disclosure of conflicts and absence even in informal settings.

g) Include standards associated with behaviour in public to require councillors representing the council or in their capacity as councillors to conduct themselves in a manner the public would reasonably expect of a person in that position.

h) Introduce industrywide zero tolerance for gifts and benefits.

i) Strengthen standards to include behaviours which harm the health and welfare of councillors or employees as being unacceptable. Align these with bullying and harassment provisions.

j) Provide administrative guidelines based on examples or case studies to assist consistent application of the standards.

PRESCRIPTION

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

Of the 45 submitters, 20 offered no comment on this issue. Eight submitters felt the current level of prescription was adequate, although one felt that the objectives should be more principle based.

Seventeen submitters suggested changes or improvements to the standards. The following is a summary of the suggestions:

a) Clarify that interpersonal and political conflict are a natural element of local government and are not regulated conduct.

b) Clarify the definitions of pecuniary interests to avoid confusion.

c) Align the definitions and provisions concerning bullying and harassment with other legislation including the Anti-discrimination Act 1977 NSW.

d) Clarify councillor's obligations as to workplace health and safety and implications for interpersonal relations with staff.

e) Introduce zero tolerance for gifts and benefits.

f) Better defined the term 'Council committee members' and provide case studies to help interpret interest disclosure decisions.

g) Insert a new section 3.23 concerning staff conduct in their interaction with councillors.

h) Consider the implications of the 'Eclipse' report in relation to Lobbying.

i) Provide more prescription of timeframes, practice for initial assessments and investigations and for dealing with vexatious and repeated complaints.

j) Clarify councillors' obligations in relation to assisting open access to information.

k) Simplify the Code by not repeating what is covered by other legislation.

TYPES OF CONDUCT

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

Of the 45 submitters 21 offered no comment on this issue. Two submitters felt the current range of conduct types was adequate, although one felt these should be better defined together with related sanctions.

Twenty-two submitters suggested changes or improvements to the types of conduct. The following is a summary of the suggestions:

a) Clarify the terms for bullying and harassment to exclude normal robust debate and valid criticisms. Clarify bullying and harassment to align more closely with other legislation and improve the means of dealing with Councillor bullying.

b) Clarify the types of misconduct that should be referred to formal investigation focusing on serious matters, not minor altercations between councillors, to allow minor matters to be dealt with summarily. Defined lower-level 'inappropriate behaviour' to be left to the discretion of councils to deal with.

c) Include issues of conduct associated with social media and online conduct. Extend the types of misconduct to actions by councillors in informal forums or their role including online settings.

d) Include contact related to breaches of Records Management guidelines and provide penalties accordingly.

e) Improve the definition of interpersonal behaviour that is not caught under the bullying and harassment provisions but nevertheless has negative impacts on councillors and staff.

f) Amend the code of conduct to reference clause 209(e) of the local government regulation to raise awareness of the definition of 'property developer' and 'close associate' to encourage better disclosure and to provide penalties for false statements.

g) Include a statement about 'politicking and political banter'.

h) Include reference to the failure to comply with open access information requirements relating to the publication of returns of councillors' interests, including possible reference to the Information Commissioner.

i) Provide further detail and guidance concerning lobbying.

TRAINING

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

Of the 45 respondents, 19 offered no comment on this issue. Eight respondents felt the current requirements as to training were adequate.

Eighteen respondents suggested changes or improvements to the standards. The following is a summary of the suggestions:

a) Councillor training should be compulsory and penalties could apply for failure to complete. For example, suspension until the course is satisfactorily completed.

b) Training should be based on common material prepared by OLG and delivered by qualified training providers on a consistent basis across the industry.

c) Training content should include interpersonal relations, effective working relationships and behavioural awareness as well as the detail of the code of conduct and case studies using actual data from the outcome of real complaints.

d) Training should begin with induction but continue periodically throughout the council term with refreshers as required.

e) There should be a minimum standard of training which all councillors must complete with recommended additional training as optional.

f) Training should include a follow-up assessment to ensure learning take-up.

g) Reporting of Councillors' attendance and completion of code of conduct training should be included in Council's annual report.

h) The oversight of consistency of the training rollout should be supervised by OLG.

i) For consistency the same training should be applied to General Managers, complaint coordinators and conduct reviewers.

LOCAL PROCESSING

► 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?

There was some difference of opinion as to whether the first response to complaints should be retained at the local government level.

Of the 45 submitters, 17 offered no comment on this issue. Ten submitters felt the current arrangements were appropriate. Eighteen submitters felt that current arrangements should be changed to varying degrees. In some cases the suggested changes were matters retaining preliminary assessment at the local level with referral then to a more independent process. In others the suggestions involved removing even the preliminary process from the Council/General Manager.

Submitters supporting local initial assessment argued that not only was this an effective way to identify and reject frivolous and vexatious complaints but also allowed the option of seeking informal resolution before incurring the time and expense of a referral and investigation.

The following is a summary of the suggestions for change:

Retain initial processing locally BUT...

- a) Improve the natural justice provisions to ensure that the accused person is provided with all information at the outset and is allowed to be heard.
- b) Require all complaints to be subject to facilitated discussion between the complainant and the accused as a first step to resolve. (Except in the case of PIDs)
- c) Councils should be required to report to OLG regularly on complaints lodged and how dealt with.
- d) OLG to provide clearer guidelines about minor vs serious conduct breaches.
- e) Councils should conduct preliminary assessment but refer any investigations to OLG to assign to a reviewer from a Panel of their oversight OR to an independent review body under OLG, ICAC, NSW Ombudsman.
- f) Repeated patterns of behaviour or complaint should be referred to OLG for investigation.
- g) Initiate Shared Services arrangements involving Internal Ombudsmen.
- h) Require a prescribed format for lodging complaints and OLG provide improved guidelines as to how to carry out preliminary assessment and determining minor vs serious breaches.

Remove initial processing from councils.

- a) OLG to receive ALL complaints and determine the manner of their being dealt with (based on a hierarchy of severity levels) (A detailed suggestion of these levels was provided by one council and is attached as **Attachment A** for information)
- b) Establish an independent assessor role or panel to whom complaints are directed or referred from council complaint coordinators, for initial assessment.
- c) Councils should refer all complaints to an independent Reviewer for preliminary assessment.

GENERAL MANAGER'S ROLE

► 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?

Of the 45 submitters, 16 offered no comment on this issue (Only one of these was a local government). Six respondents felt the current arrangements were adequate. However, one of these suggested that the application of the 'complaints assessment criteria' under 6.31 of the Procedures should be improved by specifying that General Managers or their delegates must also take this criterion into account in preliminary assessments. This should result in more matters being resolved informally by General Managers and not having to be referred to conduct reviewers at all and would simplify the process and reduce the cost burden at the same time.

Twenty-three submitters suggested changes or improvements but of these 8 recommended removing or limiting the general manager's role without offering further particulars. The following is a summary of the suggestions:

- a) The general manager may receive the complaint but not assess it. That should be referred to the complaints coordinator, Internal Ombudsman or where there is no Internal Ombudsman a Shared Services arrangement be set up with other councils.
- b) Complaints from councillors about councillors should be referred directly to OLG for assessment. Complaints from staff or public should be dealt with as currently unless the Clause 5.3 test is satisfied.
- c) Complaints should be dealt with by the Audit Committee in liaison with the complaints coordinator.
- d) Complaints should be received and dealt with by the complaints coordinator or Internal Ombudsman.
- e) Complaints should be received by the complaints coordinator and refer to an independent conduct reviewer for preliminary assessment.
- f) Council's should establish a conduct complaints committee comprising the general manager, complaints coordinator, Internal Ombudsman and HR Manager.
- g) The mayor should handle all conduct complaints about councillors.
- h) The general manager should preliminarily assess and then refer on to the OLG (i.e. remove general manager's role of referral to conduct reviewers)
- i) All conduct complaints should be referred directly to the OLG or another independent body for assessment.

MAYOR'S ROLE

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

Of the 45 submitters, 19 offered no comment on this issue. Twenty-one submitters felt the current exclusion of the mayor from a role in assessing and dealing with complaints was appropriate.

Five submitters suggested changes to the mayor's role. Only one of these suggested the mayor play a very active role throughout the entire complaint process. The following is a summary of the other suggestions:

- a) The mayor should not be involved in the complaints process but should be made aware of complaints against councillors, their actioning and referral to conduct reviewers.
- b) The mayor should not be involved in the complaints process but should be given more power and responsibility in dealing with low level conduct issues, personal disputes between councillors and bad behaviour at meetings.
- c) The mayor should have a role jointly with the general manager in the preliminary assessment of complaints about councillors and the course of action proposed.

d) The mayor should not be involved in the complaints assessment process but not be excluded from involvement in trying to resolve disputes between councillors.

e) The mayor should not be involved in the complaints assessment process but should have responsibility for ensuring recommendations about complaints are implemented.

DECLINING TO INVESTIGATE

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

Of the 45 submitters, 23 offered no comment on this issue. Seven submitters felt the current arrangements were adequate and helped eliminate frivolous and vexatious complaints as well as assisting early informal resolution.

Fifteen submitters suggested changes or improvement. The following is a summary of the suggestions:

a) Only the OLG should have power to decline to investigate.

b) Retain only where informal resolution is to be attempted.

c) Declining should not be in the hands of the general manager but the complaints coordinator, Internal Ombudsman or a panel.

d) Retain but provide clearer criteria and guidelines for declining, including required information on a complaint form.

e) Retain but provide independent review of general manager's decision.

f) All complaints should be referred to a conduct reviewer for preliminary assessment.

FRIVOLOUS AND VEXATIOUS COMPLAINTS

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

Of the 45 submitters, 21 offered no comment on this issue. Only 2 submitters felt the current arrangements were adequate but one suggested additional training would assist decision making.

Twenty-two submitters suggested changes or improvement. The following is a summary of the suggestions:

a) Clarify or improve the definitions and criteria for determining frivolous and vexatious complaints. Include the term 'misconceived' to include complaints not made out of malice.

b) Provide better guidelines, examples and 'practice directions' (as provided for in Cl.10.1) in the model procedures to assist their application. (See Ryde flowchart)

c) Complainants aggrieved by their complaint being rejected as frivolous /vexatious should have right of review by an external body. Once rejected and given reasons the council should not have to revisit the matter.

d) There should be no rights of appeal on actions taken under Clauses 5.23 and 5.25 of the model procedures.

e) Clarify Part 8 of the model procedure to improve interpretation.

f) Penalties should be provided for non-council complainants who breach confidentiality about their complaints.

g) Councillors guilty of three or more complaints rejected as frivolous/vexatious should be suspended from office for a short period.

h) Reasonable consequences should apply to frivolous/vexatious complaints.

i) Suspected frivolous or vexatious complaints should be referred to conduct reviewers for preliminary assessment.

j) Make Clause 5.3 of the model procedures more explicit that complaints must be about 'breaches of the code of conduct'.

k) Frivolous /vexatious complaints should be determined by the OLG and not the general manager.

l) Complainants should complete a prescribed form with relevant information to assist determination of frivolous/vexatious complaints and be constrained by a time limit for lodgement.

REFERRAL TO CONDUCT REVIEWERS

► 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?

Of the 45 submitters, 18 offered no comment on this issue. Only 4 submitters felt the current arrangements were adequate.

Twenty-three submitters suggested changes or improvement. The following is a summary of the suggestions:

a) Require Reviewers to consider mediation and informal resolution as part of their assessment.

b) Remove the option of internal investigations using Internal Ombudsman or Shared Services.

c) OLG to provide improved guidance to Conduct Reviewers with better definitions of types of misconduct and consequences of breach.

d) Improve the complaints assessment criteria in Clause 6.31 by requiring the general manager or delegate to consider informal resolution before referring to a conduct reviewer.

e) Provide a transparent system of auditing conduct reviewers' competence and performance, particularly in relation to natural justice and good practice.

f) Improved training, development and guidance for conduct reviewers.

g) OLG to maintain a central panel of conduct reviewers to ensure consistency and quality.

h) All complaints should be assessed by the OLG before referral to conduct reviewers.

- i) Timeframes should be specified for conduct reviewers to abide by.
- j) There should be an option for joint OLG/conduct reviewer investigations to avoid duplication in certain circumstances.
- k) Councils should appoint a complaint assessment panel internally to decide what gets referred to conduct reviewers.
- l) The same person/organisation should not be able to act as both reviewer and investigator.
- m) A process is required to ensure equitable distribution of work amongst panel reviewers.
- n) Practice Directives are required for development of 'briefs' for conduct reviewers. Briefs should be agreed to between the complaints coordinator and reviewer to set timeframes, permit QA and avoid scope creep.
- o) Variability of conduct reviewer quality, knowledge and performance needs to be addressed to achieve better consistency of outcomes.

INFORMAL RESOLUTION

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

Of the 45 submitters, 22 offered no comment on this issue. Only 4 submitters felt the current arrangements were adequate. Nineteen submitters suggested changes or improvement. The following is a summary of the suggestions:

- a) Provide increased guidance and prescription in the Code of Conduct and Procedures for General Manager/complaints coordinator to consider informal resolution prior to referral to a conduct reviewer.
- b) Strengthen provisions to:
 - Sanction councillors who refuse to abide by the outcomes of informal resolution.
 - Expand the application of 'complaints assessment criteria' in clause 6.31 of the model procedures to also apply to the initial assessment undertaken by the General Manager.
 - Have the procedures stipulate that the General Manager or conduct reviewer can resolve matters informally using the criteria clause 6.31.
- c) Encourage informal resolution by using an internal ombudsman, complaints coordinator or independent committee.
- d) Provide more training and guidance including practice directions.
- e) Require a councillor, the subject of a valid complaint, to formally attest that they acknowledged complaint and their behaviour and agree to abide by the actions arising from the informal resolution.
- f) Require councils to report informal resolution and outcomes to OLG to ensure accountability and oversight.
- g) OLG should more closely supervise the application of the guidelines by general managers and councils.

h) Informal resolution should only be facilitated by a conduct reviewer and not the General Manager or complaints coordinator.

i) Failure to reasonably participate in informal resolution should be a breach of the integrity provisions of the code and be referred to OLG or NCAT.

j) Require complainants to declare that they have reasonably sought to resolve the matter informally BEFORE lodging the complaint.

FORMAL INVESTIGATIONS

► 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?

Of the 45 submitters, 22 offered no comment on this issue. Only one submitter felt the current arrangements were adequate.

Twenty-two submitters suggested changes or improvement. The following is a summary of the suggestions:

- a) Improve the natural justice provisions and procedural fairness of investigations to ensure the accused gets a fair hearing.
- b) Investigations need to be more comprehensive.
- c) Conduct reviewer reports regarding serious misconduct should go directly to the OLG and not to the general manager.
- d) Conduct reviewers should be permitted to inform respondent councillors of the likely outcome of investigations and possible consequences, including that the matter can be terminated if the councillor agrees to an apology, mediation training.
- e) The nondisclosure of a complainant's identity needs to be better handled to maintain confidentiality.
- f) Details of investigation method could be removed from the procedures and replaced by reference to an existing government investigation process.
- g) Enforcement arrangements need to be put in place by OLG or referral to NCAT where a councillor refuses to abide by a sanction imposed.
- h) Need to improve consistency of conduct reviewers' investigations by auditing or benchmarking.
- i) Simplify investigation procedures for greater clarity.
- j) Need to require conduct reviewers to adopt and abide by timeframes for completing investigations.
- k) Improve outcomes and penalties to be more effective deterrents.
- l) Assignment of cases to conduct reviewers should be by the OLG not council or general manager
- m) Quality of investigations and conduct reviewers' reporting and conclusions need to be improved to prevent unfair process or outcomes.

n) OLG should be advised of all complaints initially and their preliminary assessment and proposed action for review, endorsement or other advice. Final outcomes of investigation should also be referred to OLG for review.

o) OLG should administer the entire process and be bound by timelines, quality standards and transparency of process.

p) Performance of conduct reviewers should be subject to better scrutiny by the OLG.

q) Investigation standards involving the burden of proof needs to be reconsidered.

r) Council decisions not to adopt the recommendation of a conduct reviewer should be referred to OLG for determination.

OLG'S OVERSIGHT POWERS

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

Of the 45 submitters, 22 offered no comment on this issue. Only 3 submitters felt the current arrangements were adequate.

Twenty submitters suggested changes or improvement. The following is a summary of the suggestions:

a) Need to strengthen OLG's oversight of conduct reviewers.

b) Councils with high levels of complaints should be investigated by the OLG.

c) OLG should monitor and investigate:

- Consistency across councils in initiating investigations.
- Consistency of findings, penalties, sanctions to ensure due process, balance and fairness.
- Incidence of multiple complaints by or about a councillor.

d) Reduce timeframes of OLG investigations and generally dealing with matters.

e) OLG should more closely scrutinise how general managers handle preliminary assessment.

f) Information about OLG investigations conducted and findings should be published.

g) OLG should give conduct reviewers, complaints coordinators and internal ombudsmen notice of any intended action arising from their reports prior to finalisation.

h) OLG's oversight should be converted to an independent local government commission with more direct powers (see further detail in discussion below)

i) OLG should be more active in identifying nonconforming procedures by councils or conduct reviewers.

j) OLG should get more reporting from councils regarding complaints that have been dismissed or resolved/dismissed without investigation.

k) OLG needs to provide better and more timely advice, support and resources for reference to general managers, complaints coordinators and conduct reviewers.

l) OLG needs more skilled staff to undertake both advisory auditing roles.

m) OLG should not conduct merits reviews of conduct reviewers investigations except in circumstances where failure of due process is suspected.

n) OLG should manage a central panel of conduct reviewers or investigators.

o) OLG should handle all councillor conduct complaints.

p) OLG and its role, resources and remit need to be thoroughly reviewed and re-established.

TIMEFRAMES

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

Of the 45 submitters, 15 (of whom only one was a local government) offered no comment on this issue. Only one submitter felt the current arrangements were satisfactory. Twenty-nine submitters felt that current timeframes taken to conclude complaints were unsatisfactory and required to be addressed.

The following is a summary of the suggestions:

a) Improve resourcing or otherwise the performance of OLG to address timeframes.

b) Require mandatory timeframes at all levels for dealing with conduct complaints.

c) Reduce the timeframe for preliminary assessment from 28 days to 14 days with an option for extension.

d) Reduce the time allowed for submission of complaints following the alleged conduct to reduce difficulties of evidence.

e) OLG's own oversight processes need to have timeframes imposed.

f) Reduce the 21 days allowed for complaint coordinators to refer a matter to the conduct reviewer to 10 working days.

g) Require complainants to submit more details on request within 5 working days.

h) Reduced time for conduct reviewers to finalise preliminary assessment to 14 days.

i) Reduce the time for complaint coordinators to refer matters to conduct reviewers from 21 days to 7 days AND reduce the period for complaint reviewers preliminary assessment from 28 days to 14 days BUT retain the period for respondent's input at 14 days.

j) Ensure consistency of timeframes between general managers and conduct reviewers, expressed in business days.

k) Establish an independent local government commission to deal with conduct complaints.

l) Have conduct complaints dealt with by an independent ombudsman shared by joint organisations of councils.

m) Provide clearer guidelines requiring the investigation approach to change from adversarial to conciliatory.

n) Strengthen the mayor's powers to deal with matters of conduct at Council meetings and prevent them from becoming formal complaints.

o) Have all matters of conduct referred to OLG in the first instance.

p) Require conduct reviewers to enter into service level agreements with prescribed service levels in relation to timeframes.

INVESTIGATION PROCESS EFFICIENCY

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

Of the 45 submitters, 21 offered no comment on this issue. Only one submitter felt the current processes were adequate. Twenty-two submitters suggested changes or improvements.

The following is a summary of the suggestions:

- a) Improve the conduct reviewer accreditation process.
- b) Provide for the conduct reviewer's determinations to be final and not require council endorsement, including any referral to the OLG or NCAT.
- c) Provide for shared arrangements for Internal Ombudsmen and complaint coordinators.
- d) Enforce timelines for conduct reviewers.
- e) Permit conduct reviewers to discontinue investigations where there is a lack of evidence to support further enquiries.
- f) Create an independent local government commission to handle all conduct complaints.
- g) Review the entire process to remove unnecessary layers of involvement and inter-referrals.
- h) Require more emphasis on informal resolution and mandatory mediation.
- i) Empower councils to refer matters directly to NCAT.
- j) Improve the quality of conduct reviewers' investigations and reporting to avoid the need for detailed review by the OLG.
- k) Empower more local resolution of complaints to reduce the scope of matters escalated to conduct reviewers or the OLG.
- l) Streamline the process and refer all complaints to the OLG.
- m) Provide more guidance by a preliminary assessment checklist to increase matters resolved at an early stage.
- n) Completely re-establish OLG with new terms of reference, resources and performance indicators.
- o) Improve natural justice and procedural fairness by enabling both the complainant and the accused to have the right to be heard in person by council.
- p) Introduce service level agreements with standards for conduct reviewers

DEALING SUMMARILY WITH MINOR BREACHES

► 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?

Of the 45 submitters, 24 offered no comment on this issue. Only one submitter felt the current arrangements were adequate.

Twenty submitters suggested changes or improvements to permit summary dealing. The following is a summary of the suggestions:

- a) Any powers for summary action need to be accompanied by clear definitions of the eligible conduct and clear procedural instructions.
- b) Establish a system of 'on-the-spot infringements' with appropriate penalties. This would need clarifying who has authority to determine the matter and what if any appeal rights exist.
- c) Dealing with complaints summarily would need clear definitions of less serious matters that are to be dealt with under this option and how. OLG needs to provide a checklist, matrix or detailed procedure for guidance in relation to defining minor conduct issues that might be dealt with this way and their associated outcomes or penalties.
- d) Allow inappropriate behaviour to be summarily dealt with by an internal ombudsman, independent panel or body exercising natural justice.
- e) Establish an independent local government commission to deal with this matter.
- f) Summary action should only be possible where there is an admission of guilt or overwhelming evidence of the offence.
- g) Summary action should involve suspension of a councillor during an investigation, similar to the arrangements applying to employees.
- h) Requires improvement in procedural fairness and natural justice.
- i) Summary action should only be dealt with by conduct reviewers with the agreement of the accused.

PRE-CORNISH POWERS

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

Of the 45 submitters, 17 (of whom only one was a local government) offered no comment on this issue. Five submitters felt the current arrangements were satisfactory. Twenty-three submitters felt that the range of powers for councils to deal with minor conduct issues needed to be restored to Pre-Cornish levels, with some conditions offered.

The following is a summary of the suggestions:

- a) Pre-Cornish powers should be restored but only to deal with less serious types of misconduct and to require explanation, undertaking, apology, training or counselling. All other types of sanctions should be the responsibility of the OLG.
- b) Restored powers are needed to provide deterrent to bad conduct.
- c) The powers should be restored but only exercisable following a formal investigation by an independent conduct reviewer during which procedural fairness has been afforded.
- d) The powers should be restored but only if there is clarity as to the conduct definitions and consequences and appropriate training and awareness is provided.
- e) The restored powers should include a range of options as per previously, subject to the recommendation of the conduct reviewer.
- f) The restored powers should provide for decisions to be endorsed by the OLG who would then instruct the council to implement the decision.
- g) Restored powers should include:
 - require an undertaking or apology
 - require training or education
 - counselling
 - removal from a committee or other representative body

APOLOGIES

► 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?

Of the 45 submitters, 23 offered no comment on this issue. Three submitters felt that councils requiring offending councillors to apologise was meaningless and not worth pursuing as an enforcement issue. Nineteen submitters suggested changes or improvements.

The following is a summary of the suggestions:

- a) Apologies should be timely and made in a council meeting forum and recorded in the minutes for transparency and accountability.

b) Failure to apologise should be escalated as misconduct to the OLG.

c) Apologies should also be published on the council's website.

d) Councils should be empowered to sanction councillors who refused to apologise.

e) Apologies should be in a prescribed format, not able to be edited by the councillor or the council and not debated.

f) One submitter thought apologies should be delivered in closed session.

g) Councils should not be permitted to participate in meetings until the undertaking or apology is delivered.

h) The form of apology should be agreed between the parties and approved by the conduct reviewer. It should be made public and not discussed or debated.

i) Apology should be given to the same audience as present when the original issue arose.

j) Apologies or undertakings not completed should be subject to harsher penalties, including suspension.

k) Apologies should be enforced by suspension if not provided in a reasonable timeframe.

COUNCILS' DISCIPLINARY POWERS

► 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?

Of the 45 submitters, 22 offered no comment on this issue. Ten submitters felt the current arrangements were adequate and that additional disciplinary powers would risk politicising the process.

Thirteen submitters suggested changes or improvement to current powers, some of which duplicated suggestions made in earlier Chapters.

The following is a summary of the suggestions:

- a) Allow councils to enforce apologies or undertakings with the OLG having power to suspend or otherwise further penalise for failure to do so.
- b) Allow low-level misconduct to be dealt with by the mayor or a panel.
- c) Empower conduct reviewers to determine complaints by
 - i. counselling
 - ii. reprimand
 - iii. direction to cease conduct
 - iv. direct mediation
- d) Strengthen penalties for serious misconduct, including dismissal.
- e) Councils should not have the right to reject the recommendation of a conduct reviewer.

- f) Councils should only accept or reject the conduct reviewer's recommendation, not have power to vary.
- g) Councils should have greater power to determine and finalise complaints themselves.
- h) Allow councils to make recommendations directly to the OLG even if not recommended by the conduct reviewer.
- i) The track record of councillors should be given weight in complaint assessments.
- j) Increase public reporting about complaints.
- k) Allow councils to engage consultants to advise on process prior to referral to a conduct reviewer.
- l) Allow councils to 'flag' to conduct reviews complaints considered to be politically motivated.

RIGHTS OF APPEAL

► 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?

Of the 45 submitters, 26 offered no comment on this issue. Only one submitter felt that as they opposed extension of the powers any comment about appeal provisions was unnecessary.

Eighteen submitters suggested changes or improvements to appeal options. The following is a summary of the suggestions:

- a) Any rights of appeal from decisions of the council should be to the OLG.
- b) Any rights of appeal from decisions of the council should be to the OLG, BUT only if re-established and incorporating a special conduct tribunal.
- c) Any rights of appeal from decisions of the council should be to an independent tribunal or agency.
- d) Any rights of appeal from decisions of the council should be to NCAT given the OLG's oversight powers in relation to councils and conduct reviewers.

DISCIPLINARY POWERS OF OLG AND NCAT

► 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?

Of the 45 submitters, 27 offered no comment on this issue. Nine submitters felt the current powers were adequate, although a number of submitters felt they were not exercised as intended or appropriately.

Nine submitters suggested changes or improvements. The following is a summary of the suggestions:

- a) OLG should have power to enforce apologies and undertakings where the councillor concerned has failed to comply and to apply more severe penalties including suspension.

- b) Eliminate duplication between the OLG and NCAT which results in the same issue is being reviewed by both jurisdictions.

- c) Reduce the misconduct disqualification threshold from three or more suspensions to TWO suspensions, to deter misconduct.

- d) There is a need for a stronger willingness of the OLG and NCAT to apply sanctions more commensurate with the nature of the breach. In particular remedy NCAT's reluctance to apply stronger penalties.

- e) OLG should have the same powers as NCAT.

- f) OLG should use performance orders on councils who demonstrate an excessive number of conduct complaints, whether justified or frivolous and vexatious.

- g) OLG should exercise current powers more effectively in terms of imposing suspensions and disqualifying from public office.

- h) OLG should apply and enforce ALL disciplinary powers relating to councillor conduct.

- i) OLG should have greater power to suspend and disqualify councillors on conduct grounds, with appeal to NCAT.

COSTS

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

Of the 45 submitters, 26 offered no comment on this issue. Eleven submitters felt the current arrangements where councils met their own costs were satisfactory. Eight submitters felt that some changes were warranted.

The following is a summary of the suggestions:

- a) NSW Government should 'share' the cost with councils as it is of 'broader sector benefit' in dealing with or deterring serious conduct matters.
- b) Introduce a funding model to encourage councils to intervene early to address poor conduct.
- c) Councils should bear the cost of investigations but be able to charge a fee for lodging complaints to deter frivolous and vexatious complaints.
- d) OLG should bear the cost as it is the regulator of local government.
- e) The complainant should bear the cost if no reasonable grounds are found for complaint.
- f) Where complaint is found to be valid, the cost should be funded either all or in part by the councillor found to be in breach the code.
- g) Each agency should fund their own costs, but the OLG should not deal with complaints that should have been referred to the Council in the first instance.
- h) OLG should pay all costs, with councils contributing a fixed fee for each complaint that requires investigation.

COST ACCOUNTABILITY

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

Of the 45 submitters, 28 offered no comment on this issue. Four submitters felt that existing accountability and reporting arrangements were sufficient. Thirteen submitters suggested changes or improvements.

The following is a summary of the suggestions:

- a) Council statistical reporting should be aligned to the financial year.
- b) Improve quality and frequency of reporting to the OLG to monitor types and outcomes of complaints.
- c) Require councils to 'risk assess' the cost of outsourcing complaints.
- d) Require councils to report the cost of each investigation to an open session of the council meeting.
- e) Publish costs of dealing with complaints in the annual report and on the council's website.
- f) Publish details of proven breaches involving serious conduct in the annual report.
- g) Some initiative should be made to address the open-ended nature of conduct reviewer's investigations and therefore costs.
- h) Improve the transparency and detail of reporting and costs per investigation subject to privacy concerns
- i) Costs of investigations should be reported to the public as a proactive release document under GIPA as well as annual reporting to the OLG.

RECOVERY OF COSTS FROM COUNCILS

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

Of the 45 submitters, 25 offered no comment on this issue. Eighteen submitters felt the current arrangements were the most appropriate.

Only two submitters suggested changes to enable OLG to recover costs from Councils. The following is a summary of the suggestions:

- a) OLG should meet its own costs of oversight of local government, except where it is found that Council failed corporately to prevent or mitigate the misconduct.
- b) OLG should be able to recover DIRECT costs only, not overheads.

RECOVERY OF COSTS FROM COUNCILLORS

► Should councils and/or the 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?

Of the 45 submitters, 21 offered no comment on this issue. Twelve submitters felt that the current arrangements were the most appropriate.

Twelve submitters suggested changes or improvements. The following is a summary of the suggestions:

- a) Investigation costs should be recovered from councillors found to have committed misconduct only where the council has met its corporate responsibilities to prevent or mitigate misconduct.
- b) Enable part recovery of costs where there is a clear finding of misconduct. There were options suggested as to how this will be calculated:
 - i. require 50% or \$2,000 whichever is the lesser
 - ii. create a sliding scale commensurate with severity of the breach
 - iii. nominal amount equal to all or part of annual meeting fees
- c) Impose a contribution towards costs of a nominated figure but ensuring controls to prevent victimisation of councillors through multiple or continuous complaints.

Attachment ‘C’ – Oath and affirmation of office

Based on discussion in Section 3 of this report the following revised format is offered as addressing the concerns raised.

233A Oath and affirmation for councillors

(1) A councillor must take an oath of office or make an affirmation of office at or before the first meeting of the council after the councillor is elected.

(2) The oath or affirmation may be taken or made before the general manager of the council, an Australian legal practitioner or a justice of the peace and is to be in the following form—

Oath

I [*name of councillor*] swear that, I will undertake the duties of the office of councillor in the best interests of the people of [*name of council area*] and the [*name of council*], that I will faithfully and impartially carry out the functions, powers, authorities and discretions vested in me under the *Local Government Act 1993* or any other Act to the best of my ability and judgment **and that I will faithfully observe and comply with the Code of Conduct for Councillors as it applies to my office.**

Affirmation

I [*name of councillor*] solemnly and sincerely declare and affirm that I will undertake the duties of the office of councillor in the best interests of the people of [*name of council area*] and the [*name of council*], that I will faithfully and impartially carry out the functions, powers, authorities and discretions vested in me under the *Local Government Act 1993* or any other Act to the best of my ability and judgment **and that I will faithfully observe and comply with the Code of Conduct for Councillors as it applies to my office.**

(3) A councillor who fails, without a reasonable excuse, to take the oath of office or make an affirmation of office in accordance with this section is not entitled to attend a meeting as a councillor (other than the first meeting of the council after the councillor is elected to the office or a meeting at which the councillor takes the oath or makes the affirmation) until the councillor has taken the oath or made the affirmation.

(4) Any absence of a councillor from an ordinary meeting of the council that the councillor is not entitled to attend because of this section is taken to be an absence without prior leave of the council.

(5) Failure to take an oath of office or make an affirmation of office does not affect the validity of anything done by a councillor in the exercise of the councillor’s functions.

(6) The general manager must ensure that a record is to be kept of the taking of an oath or the making of an affirmation (whether in the minutes of the council meeting or otherwise).

Attachment 'D' – Enforcement options for councillor conduct standards

SCHEDULE OF COUNCILLOR CONDUCT AND JURISDICTIONAL ENFORCEMENT OPTIONS - NSW				
Class	Description	Jurisdiction	Enforcement options	Recourse
Type 1 - Disorderly Meeting Conduct	<p>(a) contravenes the Act, the Regulation or any provision of the code of meeting practice adopted by the council under section 360(3) of the Act, including any provisions incorporated in the adopted code that are prescribed by the Regulation as mandatory provisions of the model code of meeting practice, or</p> <p>(b) assaults or threatens to assault another councillor or person present at the meeting, or</p> <p>(c) moves or attempts to move a motion or an amendment that has an unlawful purpose or that deals with a matter that is outside the jurisdiction of the council or committee, or addresses or attempts to address the council or committee on such a motion, amendment or matter, or</p> <p>(d) insults, makes unfavourable personal remarks about, or imputes improper motives to, any other councillor or a member of staff or delegate of a council, or</p> <p>(e) says or does anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or committee into contempt.</p>	Mayor	<p>(a) Warning</p> <p>(b) Direction to retract statement and apologise without reservation.</p> <p>(c) Direction to cease the act of disorder and desist from repeating that act for the duration of the meeting.</p> <p>(d) Direction to refrain from participating in discussion or debate on business before the meeting for a specified item or specified time or for the remainder of the meeting. [This is consistent with the current power of the Chair to 'mute' a councillor's audio link at an audio-visual meeting.]</p> <p>(e) Direction to withdraw from the meeting for a specified time or for the remainder of the meeting</p>	<p>These directions shall be at the absolute discretion of the meeting Chair and not subject to a dissent motion.</p> <p>In giving the direction the Chair shall explain the reasons for the direction and the provision under the Model Code of Meeting Practice that has been breached. The direction and reasons will be recorded in the Minutes of the meeting.</p> <p>Improper use of these powers will subject the Chair to a complaint for misconduct under the relevant Part of the Code of Conduct.</p>
Type 2 – General Conduct	<p>Type 2 (a) - General Misconduct</p> <p>General Conduct</p> <p>Fairness & Equity</p> <p>Harassment & Discrimination</p> <p>Bullying</p> <p>WH&S</p> <p>Land use planning & Regulation</p> <p>Caucusing</p> <p>Serious or Repeated Disorderly Meeting conduct</p> <p>Generally, as provided for under Part 3 of the Model Code of Conduct when occurring other than in a council meeting environment.</p> <p>Type 2 (b) – Serious Misconduct</p> <p>Non-pecuniary Conflicts of Interest (Except Political Donations)</p> <p>Significant Non-pecuniary Conflicts of Interest</p> <p>Personal Benefit</p> <p>Improper/Undue Influence</p>	Chair of the ICCRP subject to a report from an Independent Conduct Reviewer	<p>(a) Dismiss as not a Code of Conduct complaint, vexatious, frivolous, insufficient to identify an offence.</p> <p>(b) Resolve informally or by alternative means.</p> <p>(c) Refer to external agency.</p> <p>(d) Refer to ICAC</p> <p>(e) Subject to investigation:</p> <ul style="list-style-type: none"> Dismiss the complaint as unsubstantiated. Where the complaint is found to be substantiated – <ul style="list-style-type: none"> - Formal censure of the Councillor. - Suspension or removal of the Councillor from a position representing the local government other than the office of councillor. 	<p>In respect of Option (e) an aggrieved party may seek review of the matter by OLG but only on grounds of denial of natural justice.</p>

SCHEDULE OF COUNCILLOR CONDUCT AND JURISDICTIONAL ENFORCEMENT OPTIONS - NSW

Class	Description	Jurisdiction	Enforcement options	Recourse
	<p>Relationships with officials</p> <p>Access to Information /Council resources</p> <p>Repeated acts of General Misconduct</p> <p>Misuse of Disorderly Meeting</p> <p>Conduct powers by Mayor or Meeting Chair.</p> <p>Generally as provide for under Parts 5,6,7 & 8 of the Model Code of Conduct.</p>		<p>- Direct the Councillor to make public admission and apologise unreservedly.</p> <p>- Direct the Councillor to attend training or counselling to address conduct.</p> <p>- Direct the Councillor to refrain from repeating the same or similar conduct.</p> <p>- Direct that the Councillor be suspended from attendance at Council meetings for a nominated period of time or number of meetings, in accordance with ICCRP guidelines.</p> <p>(f) Subject to an investigation report refer to OLG for direction</p> <ul style="list-style-type: none"> • Matters re Part 4 of the Code of Conduct • Matters re Part 9 of the Code of Conduct • Serious or repeated Type 2 breaches. • Failure of the Councillor or the Council to implement the recommendation or direction of the ICCRP Chair. <p>(g) In addition to or in place of any of the above refer the matter to the Commissioner for consideration or direction as to further action. E.g. in the case of repeat or serious offences.</p> <p>(h) Where a councillor is found to have breached the Code of Conduct for a third time during the Council term, direct the councillor to reimburse the council all or some of the cost of the investigation according to the Commissioner's guidelines</p>	

SCHEDULE OF COUNCILLOR CONDUCT AND JURISDICTIONAL ENFORCEMENT OPTIONS - NSW

Class	Description	Jurisdiction	Enforcement options	Recourse
Type 3 – Integrity Issues	<p>Pecuniary Interest</p> <p>Significant Non-pecuniary Interest</p> <p>Political Donations</p> <p>Integrity of the Code</p> <p>Generally as provided for under Part 4, Parts 5.10 and 5.15 and Part 9 of the Model Code.</p> <p>Other matters submitted for direction from Independent Councillor Conduct Review Panels</p>	Councillor Conduct Commissioner	<p>All powers previously available to OLG under relevant legislation (with some amendments). Namely:</p> <ul style="list-style-type: none"> 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 or remove the Councillor from a position representing the local government other than the office of councillor suspend the councillor from civic office for a period not exceeding 3 months (with or without remuneration) suspend the councillor from attendance at or participating in Council or Committee meetings for a period not exceeding 4 months (with or without remuneration) require the councillor to reimburse all or some of the cost of the investigation according to the Commission's guidelines in addition to, or in place of, any of the above, refer the matter to NCAT for its consideration or direction as to further action. 	Appeal to NCAT as available under relevant legislation.
Type 4 – Corrupt Conduct	As defined in Part 3 of the ICAC Act 1988	ICAC	All powers available to ICAC under relevant legislation.	Appeal as available under relevant legislation.

Attachment 'E' – Outcome of recent inquiries

E

Outcome of recent Inquiries related to Councillor Conduct	
Inquiry Name	Recommendations
Wingecarribee Shire Council Public Inquiry June 2022	Recommendation 3 That a standardised mandatory induction program be developed for all councillors in New South Wales covering (at least) <ul style="list-style-type: none"> a. The statutory roles and responsibilities of the councillor (including detailed guidance on the distinction between the strategic roles of the councillor and the operational function of the council staff); b. The Model Code of Conduct, included training on how breaches of it are dealt with; c. The Model Code of Meeting Practice and meeting procedure, including clear guidance for moving motions, amendments, foreshadowed motions, rules of debate, and acts of disorder and how they may be dealt with; d. Councillor misconduct, and the responses to it; e. Other "core" councillor skills necessary to fulfil the statutory obligations of a Councillor.
	Recommendation 4 That a standardised mandatory training for Mayors and Deputy Mayor's be developed in relation to the Code of Meeting Practice (which can be supplemented to include any variances in the particular Code adopted by the particular Council) and skills and techniques for chairing meetings, including particular focus on meeting procedure, maintaining order, and techniques and powers for dealing with acts of disorder, with such training to be undertaken within a reasonable time of been elected to the position.
	Recommendation 5 Consideration be given to amending clauses 183 and 184 of the Local Government (Gen) Regulation 2021 to make attendance at compulsory induction training (including of the kind referred to in recommendations three and four above, if adopted) mandatory.
	Recommendation 6 That consideration be given to amending the Procedures for the Administration of the Model Code of Conduct for local councils in New South Wales to require that, in circumstances where a councillor has been found following an independent review to have been in breach of the Code of Conduct that: <ul style="list-style-type: none"> a. The conduct reviewer included in the report a short summary of the breach(es) of the Code of Conduct that have been found which identifies the factual circumstances and a list of each provision contravened; b. The resolution of Council reported to the public meeting and recorded in the minutes must include; <ul style="list-style-type: none"> i. an identification of the councillor who was in breach of the code of conduct; ii. a short summary of the conduct that constituted a breach of the code of conduct found by the independent reviewer from the report as identified in subparagraph (a.) above, including an identification of the provisions of the Code of Conduct that had been contravened; and iii. a summary of the action taken by the governing body in response to that report, including the reasons for any departure from the recommendation of the independent conduct reviewer (if that be the case)
	Recommendation 7 That consideration given to requiring councils to maintain a public register of each established breach of the Code of Conduct by councillors.

Outcome of recent Inquiries related to Councillor Conduct	
Inquiry Name	Recommendations
	Recommendation 8 That the Model Code of Conduct be amended to capture other circumstances where conflicts of interest may arise and which do not fall within the current definition of “personal interest”, including where a councillor has aided an applicant or objector to a development application or for any other service to Council.
	Recommendation 9 That consideration be given to amending the local government act to make the divisions between operational and strategic responsibilities clearer by making it clear in the statute that a councillor is not permitted to direct or seek to influence (whether directly or indirectly) council staff in the performance of duties
	Recommendation 7 That the NSW Government amends the Lobbying of Government Officials Act 2011 (LOGO Act) to ensure all provisions apply to local government.
	Recommendation 8 That the NSW Department of Planning and Environment ensures any guidelines issued pursuant to s 23A of the Local Government Act 1993 regarding the lobbying of councillors include advice about: <ul style="list-style-type: none"> the nature and frequency of meetings between councillors and interested parties, including the need to ensure transparency around these interactions how and where to report concerns about lobbying practices the receipt of submissions outside of formal processes, including the transmission of material to specific councillors in a way that excludes other councillors and staff councillors’ attendance at staff meetings with parties interested in an outcome councillor representations to staff arising from lobbying interactions the lobbying of councillors by interested parties with whom they have a pre-existing relationship.
	Recommendation 10 That the NSW Department of Planning and Environment updates the Model Code of Conduct for Local Councils in NSW to refer to any councillor lobbying guidelines and to reflect the substantive advice contained in the guidelines.
	Recommendation 11 That City of Canada Bay Council (CCBC) adopts a policy regulating interactions between councillors and staff. The policy should cover councillor representations to staff arising from lobbying activities and the attendance of councillors at proponent meetings with staff.
	Recommendation 12 That CCBC continues to provide conflict of interest training to councillors, at least on a biennial basis. The training should cover situations where councillors are lobbied by those with whom they have a relationship or association and the circumstances where this would give rise to a conflict of interest.
	Recommendation 13 That the Department of Planning and Environment amends the Model Code of Conduct for Local Councils in NSW to generally prohibit councillors’ involvement in matters where they have a pecuniary or significant non-pecuniary conflict of interest, beyond exercising the general rights afforded to a member of the public. An exception should be made in circumstances where a councillor reallocates or delegates their duties, refers interested parties to the appropriate way of making a representation or makes a complaint due to becoming aware of improper conduct.

Outcome of recent inquiries related to Councillor Conduct	
Inquiry Name	Recommendations
	Recommendation 14 <p>That the Department of Planning and Environment amends the Model Code of Conduct for Local Councils in NSW to include provisions about the appropriate role of council workshops. In particular, it should be made clear that workshops cannot be used to transact council business.</p>
	Recommendation 15 <p>That CCBC continues to offer planning training to councillors during each term on their obligations under the Environmental Planning and Assessment Act 1979, particularly regarding the consideration of planning proposals.</p>
Balranald Shire Council Public Inquiry November 2019	Recommendation 4 <p>Prior to the next ordinary council election involving Balranald Shire Council, that an information session for prospective candidates be conducted to provide information about the obligations and burdens on future Councillors.</p>
	Recommendation 5 <p>Within three months of the next ordinary Council election involving Balranald Shire Council, that mandatory training be provided to each councillor, including training relating to the Model Code of Conduct and the Model Code of Meeting Practice.</p>
Central Coast Council Public Inquiry February 2022	Recommendation 4 <p>Prior to the next ordinary council election involving Central Coast Council, information sessions for prospective candidates be conducted to provide information about the obligations and burdens on future councillors.</p>
	Recommendation 5 <p>Within three months of the next ordinary Council election involving Central Coast Council, mandatory training be provided to each councillor, including training relating to financial management specific to local government.</p>
	Recommendation 6 <p>Consideration be given to introducing as a mandatory requirement for all councillors, the completion of an accredited course for company directors, or a course of equivalent rigour developed specifically for local government councillors, within the first twelve months of their election, with refresher courses for councillors who have previously completed such courses.</p>
ICAC Operations Operation "Dasha"	<p>That the DPIE amends the Model Code of Meeting Practice for Local Councils in NSW to require that council business and briefing papers include a reminder to councillors of their oath or affirmation, and their conflict of interest disclosure obligations.</p> <p>That the DPIE, following a reasonable period of consultation, issues guidelines under s23A of the LGA to introduce measures to enhance transparency around the lobbying of councillors. The guidelines should require that:</p> <ul style="list-style-type: none"> councils provide meeting facilities to councillors (where practical) so that they may meet in a formal setting with parties who have an interest in a development matter councils make available a member of council staff to be present at such a meeting and to prepare an official file note of that meeting to be kept on the council's files (any additional notes made by the member of council staff and/or the councillor should also be kept as part of the council's records) all councillors be invited when a council conducts formal onsite meetings for controversial re-zonings and developments council officers disclose in writing to the general manager any attempts by councillors to influence them over the contents or recommendations contained in any report to council and/or relating to planning and development in the local government area.

Outcome of recent Inquiries related to Councillor Conduct

Inquiry Name	Recommendations
	<p>That the DPIE, following a reasonable period of consultation, issues guidelines under s23A of the LGA to introduce measures to enhance transparency around the lobbying of councillors. The guidelines should require that:</p> <ul style="list-style-type: none"> councils make available a member of council staff to be present at such a meeting and to prepare an official file note of that meeting to be kept on the council's files (any additional notes made by the member of council staff and/or the councillor should also be kept as part of the council's records) council officers disclose in writing to the general manager any attempts by councillors to influence them over the contents or recommendations contained in any report to council and/or relating to planning and development in the local government area.

Attachment 'F' – Interstate comparisons

Recent State reviews

Jurisdiction and timing	Focus and method of review	Key outcomes
South Australia 2019-22	<ul style="list-style-type: none"> Part of wide-ranging review of the LG Act State agency plus intensive sector (LG Association) consultation/negotiation 	<ul style="list-style-type: none"> Act amended June 2021 Code of conduct replaced with Ministerial Standards and council policies Hierarchy of Misbehaviour (handled by councils or new Behavioural Standards Panel, Integrity (Ombudsman) and Corruption (ICAC) Panel managed by LG Association, with full cost recovery
Queensland 2021-22	<ul style="list-style-type: none"> Parliamentary Committee Inquiry into the Office of the Independent Assessor (OIA) 	<ul style="list-style-type: none"> Hearings completed but report still waited Key areas of concern related to whether OIA was operating in accordance with the <i>intent</i> of the Act, delays in resolving complaints, and possibly excessive and improper use of Assessor's powers to initiate complaints and intervene in processes
Tasmania 2021-22	<ul style="list-style-type: none"> Departmental review with public consultation 	<ul style="list-style-type: none"> Standard code of conduct plus voluntary adoption of a behaviour standard policy for councillors Councils to adopt a local dispute resolution policy in councils to reduce the number of formal Code complaints Improved process for the initial assessment of complaints, to be handled by a legally qualified panel member, with an additional 'public interest' test to weed out those that do not warrant further action Disclosure and management of possible conflicts of interests by Panel members.
Victoria 2021-22	<ul style="list-style-type: none"> Targeted review of 'Local Government Culture' External consultants plus sector-focused consultation Focus on the LG sector itself promoting cultural change 	<ul style="list-style-type: none"> Potential greater use of state-appointed Monitors to assist councils experiencing problems with councillor behaviour Scope for expanded training (eg leadership skills), support for mayors, councillor-CEO relations, understanding/use of social media
Western Australia 2017-22 (Stage 1 completed 2019 – new Code of Conduct and training requirements)	<p>Part of wide-ranging review of the LG Act</p> <p>State agency plus sector and broader community consultation</p>	<p>Minor behavioural breaches (inc meeting behaviour) remain a council responsibility</p> <p>New Chief LG Inspector to handle more serious Code breaches</p> <p>New Conduct Panel with powers to impose stronger penalties</p> <p>Chief Inspector may appoint Monitors to intervene in councils experiencing serious/repeated problems</p>

COMPARISON SUMMARY

In summary, the research finds:

- Most jurisdictions have mandatory/model codes that are limited to elected members and are much briefer.
- Most jurisdictions require considerable detail or use of a statutory form when complaints are lodged.
- Complaints are typically lodged with the relevant council in the first instance except in Queensland, where the Office of the Independent Assessor is the focal point. In most jurisdictions, complaints are ‘triaged’ by the executive officer or chair of the relevant statutory panel. The council chief executive’s role is typically limited to appointing a complaints officer and/or providing administrative support to the handling of complaints.
- There is an evident trend towards enabling councils to handle poor conduct in meetings separately from the broader complaints system, at least in the first instance.
- For ‘mid-range’ breaches all jurisdictions have legislated statutory panels to determine complaints and/or decide if they should be referred elsewhere.
- All Acts (except South Australia) specify serious offences, as opposed to lesser breaches, and associated penalties that can be imposed.
- There is an evident trend to enabling panels to impose stiffer penalties for ‘mid-range’ breaches, including suspension for up to 3 months or as much as 12 months.
- In marked contrast to NSW, there is little prescription in other states of the parties’ (and particularly the respondent’s) rights to seek/require review loops at various stages during the process - as opposed to appealing the decision at the end.
- No other state agency has been given the extensive role and authority exercised by the NSW OLG - notably its heavy involvement in dealing with and determining mid-range complaints, as well as investigating the most serious breaches, its right to intervene (as opposed to assist) in lower-level matters being handled for councils by reviewers and its power to impose penalties.
- As a general rule, the equivalent agencies (and their chief executives) elsewhere are largely limited to overseeing the system and supporting and advising the Minister as required.

Key points of comparison: disorderly meeting behaviour	
New South Wales	<ul style="list-style-type: none"> • Chair’s ruling on disorder must be obeyed unless a motion of dissent is passed. • Councils <i>may</i> give chairs power to expel offenders; otherwise, a vote is required at each meeting.
Queensland	<ul style="list-style-type: none"> • Chair has authority to reprimand and/or order councillor to leave. • Failure to comply or 3 orders to leave in 1 year escalates to Inappropriate Conduct with possibly substantial penalties.
South Australia	<ul style="list-style-type: none"> • Mayor/Chair’s order may be reviewed by the Standards Panel as a potential breach in itself (to prevent use of orders for political purposes).
Tasmania	<ul style="list-style-type: none"> • Chair may suspend a councillor from meeting if the councillor makes a personal reflection about another councillor or council employee and refuses to apologise; interjects repeatedly; or disrupts the meeting and disobeys a call to order. • Failure to comply with Chair’s order may incur a fine.
Western Australia	<ul style="list-style-type: none"> • Provisions similar to Qld and SA are now being introduced • Subsequent complaints about the same behaviour at a meeting may be dismissed if the matter was dealt with properly at the time.

Key points of comparison: Scope of code of conduct

New South Wales	<ul style="list-style-type: none"> Mandatory Model Code and Procedures plus Model Code of Meeting Practice made by Regulation (total 194 pp including graphics)* Code applies to Councillors, all officials, delegates, committee members (unless wholly advisory); covers any conduct likely to bring a council into disrepute. Not intended to address interpersonal/political conflict nor to restrict free speech and 'respectful' debate
Queensland	<ul style="list-style-type: none"> Mandatory Code made by Regulation (6pp); applies only to councillors. Model Procedures for meetings made by department – councils' adopted procedures must be consistent. Local Government Principles in the Act require among other things transparency, good governance, ethical and legal behaviour.
South Australia	<ul style="list-style-type: none"> Previous Code replaced with behavioural/integrity provisions in the Act, plus Behavioural Standards established by the minister in consultation with LGASA Standards apply to councillors, members of committees and council subsidiaries. Each council develops Behavioural Support and Management Policies (effectively a code plus procedures) consistent with the Standards (LGASA provides models). Act itself covers conflicts of interests and the Health and Safety Duties of councillors (prevention of harm to others, including bullying).
Victoria	<p>Each council adopts a Code consistent with mandatory Standards of Conduct (set by Regulation); also their own governance rules, meeting procedures and gifts policy (consistent with Act); standards do not limit robust political debate.</p> <p>CEOs adopt policies for councillor-staff interactions.</p> <p>Act sets out framework, institutions, processes for councillor conduct, subject to further provisions in regulations, codes, policies.</p>
Western Australia	<p>Mandatory Model Code (11pp) prescribed by Regulation – sets principles, requirements and rules of conduct; applies to councillors, committee members, candidates (if later elected)</p> <p>Councils adopt their own Code consistent with the Model but cannot vary rules of conduct or provisions re candidates.</p>

*At A Glance summary plus *Guide to Completing Returns of Interest* are available (each 10pp)

Key points of comparison: Making a complaint

New South Wales	<ul style="list-style-type: none"> • Generally, In writing to the council GM or 'another agency' (OLG, ICAC, Ombudsman) within 3 months of alleged breach – no form. • Must not be trivial, frivolous, vexatious or made for an improper purpose. • GM may initiate action re a suspected breach even without a complaint. • Some complaints may be handled under the Public Interest Disclosures Act or 'special arrangements' with OLG
Northern Territory	<ul style="list-style-type: none"> • In writing to council CEO – statutory form and declaration plus supporting documents if necessary.
Queensland	<ul style="list-style-type: none"> • Generally, in writing to Office of Independent Assessor or Crime and Corruption Commission; OIA has an online form and may accept complaints by phone • Penalties for vexatious or improper complaints. • Councillors and officers must notify OIA if they suspect misconduct.
South Australia	<ul style="list-style-type: none"> • To council in accordance with its Behavioural Management Policy.
Tasmania	<ul style="list-style-type: none"> • In writing to council GM – statutory form and declaration plus fee (refunded if complaint upheld); within 6 months. • Complaint must nominate relevant provision/s of Code and detail efforts made to resolve the matter.
Western Australia	Under review

*CEO unless role is delegated

Key points of comparison: Role of state department*

New South Wales	<ul style="list-style-type: none"> • OLG has complete control over Code processes – may intervene at any time or investigate on its own initiative or on referral from Ombudsman or ICAC; various matters can only be investigated by OLG. • OLG chief executive has personal authority to impose penalties.
Northern Territory	<ul style="list-style-type: none"> • Minimal specified role in Code complaints and councillor behaviour, but may act as ‘a person’ in referring matters to ICAC. • Chief executive may approve mandatory training courses. • LGANT is authorised to establish and operate Panel processes.
Queensland	<ul style="list-style-type: none"> • Minimal – system administration and advice to minister (eg if suspension or dismissal of a councillor is recommended). • Principal roles rest with Office of Independent Assessor and Councillor Conduct Tribunal.
South Australia	<ul style="list-style-type: none"> • Minimal – oversight system, support to minister. • LGASA manages the Standards Panel and provides advice to councils • Ombudsman plays a significant investigative role in more serious matters
Tasmania	<ul style="list-style-type: none"> • Administrative support for Panels but no intervention in Panel process. • Handles the most serious complaints involving an offence under the Act.
Victoria	<ul style="list-style-type: none"> • Appoints and resources the arms-length Conduct Registrar (administrative roles). • Otherwise minimal – oversight system, advice to councils, support to minister. • Separate Office of the Chief Inspector
Western Australia	<ul style="list-style-type: none"> • Under review – separate ‘Office of the Chief Inspector’ to be established

*As opposed to a special purpose agency

Key points of comparison: Ensuring procedural fairness and natural justice

New South Wales	<ul style="list-style-type: none"> Respondent must be given details of a proposed investigation; may seek further details, meet with the Investigator (with a legal or other adviser for support); may make submissions at various specified stages of the investigation, also in response to draft reports and amendments. Investigations are conducted in private and councils must consider the final report in camera; the respondent may make a further submission at that time. Right of appeal to NCAT.
Queensland	<ul style="list-style-type: none"> Investigations are to be kept confidential as far as possible. Investigations and hearings must accord with principles of natural justice. Conduct Tribunal decisions may be appealed to QCAT.
South Australia	<ul style="list-style-type: none"> Procedural fairness must be observed by councils and Standards Panel, but matters must be addressed expeditiously; no rules of evidence No specific review or appeal provisions – respondents are free to use any existing channel (Ombudsman, courts etc).
Tasmania	<ul style="list-style-type: none"> Panels must observe rules of natural justice; respondent may make submissions, appear at hearings. Hearings are private and matters remain confidential until a final determination is tabled at council meeting. Panel decisions may be appealed to the Magistrates Court (Administrative Appeals Division) but only on the grounds of lack of natural justice.
Victoria	<ul style="list-style-type: none"> Rules of natural justice apply to Panel hearings and respondent must be heard. Right of appeal to VCAT.

Key points of comparison: Available penalties

New South Wales	<ul style="list-style-type: none"> Councils may only censure the councillor and publish the reasons, but can also refer the case to OLG for further investigation and additional penalty. OLG Chief Executive may impose various orders (desist, counselling, training etc), plus suspension and/or loss of fees for up to 3 months. NCAT may impose up to 6 months suspension and/or loss of fees. Serious Corrupt Conduct may lead to dismissal/disqualification for up to 5 years.
Queensland	<ul style="list-style-type: none"> For Inappropriate Conduct, a council may order reprimand, public admission, training or counselling, exclusion from a meeting, resignation from council positions (other than that of councillor), reimbursement of council's costs. A repeat offence may be treated as Misconduct and referred to Tribunal. For Misconduct, the Tribunal may impose exclusion from 3 meetings and/or the role of committee chair for the current term, forfeit of an allowance, benefit or use of resources; and may recommend suspension or dismissal (by the Minister). Offences under the Act attract up to 2 years jail
South Australia	<ul style="list-style-type: none"> No criminal penalties in LG Act – matters for ICAC and law enforcement. Councils – censure, public apology or training, suspension from any office held other than councillor. Panel – as above plus public reprimand, reimbursement of costs, suspension for up to 3 months, escalate the complaint to SACAT. SACAT – as above, plus fines up to \$5K (\$10K for non-compliance with Panel order), dismiss from office, disqualify for up to 5 years.

Key points of comparison: Available penalties

Tasmania	<ul style="list-style-type: none"> • Unsuccessful complainant may be ordered not to make a similar complaint for 12 months. • Panel may impose a caution, reprimand, apology, counselling or training, suspension for up to 3 months. • Minister may dismiss a councillor suspended 3 times in two consecutive terms. • For serious matters, State Director of LG may refer findings to the Integrity Commission, Auditor-General or a law enforcement body for further action.
Victoria	<ul style="list-style-type: none"> • Council Arbiter – apology, suspension for up to 1 month, removal from position (eg as committee chair), training or counselling. • Conduct Panel – reprimand, apology, suspension for up to 12 months; ineligible to be mayor or chair a special committee for up to remainder of term. • Panel may also impose remedial action to improve behaviour regardless of whether misconduct proven. • VCAT (if Gross Misconduct proven) – dismissal, disqualify for up to 8 years. • Offences under Act – range from \$11K (eg failure to register interests) to \$111K/5 years jail (eg misuse position for personal gain).

FOCUS ON CIVIC RESPONSIBILITY

COUNCILLOR CONDUCT ACCOUNTABILITY IN NEW SOUTH WALES

A REPORT FOR THE HON. WENDY TUCKERMAN MP, MINISTER FOR LOCAL GOVERNMENT.



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