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Free speech in local government in NSW

A guideline

June 2025



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Published by NSW Department of Planning, Housing and Infrastructure

dphi.nsw.gov.au

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First published: June 2025

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Introduction

The recent review of the councillor conduct framework and concerns that some councils may have implemented their codes of conduct in a way that unduly constrains councillors' ability to engage freely with the community has highlighted the need to provide practical guidance to councils on what free speech means in the context of NSW local government.

In a broad sense political communication relates to any form of campaigning around a discussion or decision. In the case of elected officials there is an implied public trust that political communication to support debate will be fair. Unfortunately, where the debate is not fair and includes victimisation or vilification, that public trust is quickly lost.

This guideline (Guideline) provides guidance on the following:

- the implied freedom of political communication under the Australian Constitution (the Constitution) and how free speech is regulated in Australia,
- why the ability to engage freely with the community is central to a councillor's role as an elected representative prescribed under the *Local Government Act 1993* (the Act),

- the relevant provisions of the Model Code of Conduct for Local Councils in NSW (Model Code of Conduct) that recognise the importance of public comment by councillors and how they should be applied by councils to ensure they do not unduly inhibit free speech,
- the protections available to councillors in relation to civil liability for defamation,
- the meeting rules constraining what can be said at council and committee meetings, how they can be applied and the relationship between these and the enforcement mechanisms available under councils' codes of conduct,
- how council media and social media policies should be applied so as not to unduly constrain councillors' ability to engage with the community via the media and online.

This Guideline has been issued under section 23A of the Act. Councils and council officials must take it into consideration when exercising their functions. This Guideline is also to be considered by conduct reviewers when dealing with code of conduct matters that have been referred to them.

How is free speech regulated in Australia?

The High Court of Australia has found that the Constitution contains an implied freedom of political communication which imposes limits on the laws that Australian Parliaments can make.

The implied freedom of political communication as established by the High Court, is a constitutional principle that ensures Australians can make informed choices as electors. It's not a personal right, but rather a restriction on governments' ability to interfere with the free communication of political

information. This freedom is derived from the Constitution's provisions for representative government, which require that members of Parliament be "directly chosen by the people".

It is important to note that the freedom of communication under the Constitution is not absolute. It can be limited by laws that are "reasonably appropriate and adapted to serve a legitimate end which is compatible with the maintenance of representative and responsible government"¹.

¹ *Lange v Australian Broadcasting Corporation* [1997] HCA 25, (1997) 189 CLR 520

Why is free speech important in NSW local government?

Local government in NSW is a democratic institution. A democratic system of local government allows local communities to shape decisions impacting on their future, (such as the delivery of infrastructure and services and the exercise of place-making functions), by electing community representatives to serve as members of the local council's governing body.

Councillors' ability to freely engage with their communities and to participate in public debate on issues impacting on the council and the community via the media and social media is key to their being able to exercise their functions as democratically elected representatives effectively.

Why is making public comment an important part of a councillor's role as an elected representative?

Key provisions in the Act reflect the important role councillors have as elected representatives and impact on the way in which they engage and communicate with their communities when undertaking that role.

Under section 223 of the Act, the council's governing body is responsible for providing civic leadership, regularly consulting with community groups and

stakeholders, and keeping them informed of the council's decisions and activities.

Mayors of councils have a separate and special role as the leader of the council. Among other things, the role of a mayor prescribed under section 226 of the Act includes:

- being the leader of the council and a leader in the local community,
- advancing community cohesion and promoting civic awareness,
- being the principal member and spokesperson of the governing body of the council, including representing the views of the council as to its local priorities, and
- promoting partnerships between the council and key stakeholders.

Individual councillors also have an important role under section 232 of the Act in facilitating communication between the local community and the governing body.

Section 232 of the Act also places a responsibility on individual councillors to uphold and represent accurately the policies and decisions of the governing body. As noted in the Office of Local Government's (OLG) Councillor Handbook²², the requirement to uphold the policies and decisions of the council should be read in the context of the implied freedom of political communication under the Constitution. In practical terms, councillors remain free to speak about the policies and decisions of the council, but they must accept these decisions are lawfully made if passed by a majority and must not misrepresent them.

How does the Model Code of Conduct apply to public comment by councillors?

The ethical and behavioural standards all council officials are required to comply with when exercising their functions are prescribed under the Model Code of Conduct. These standards meet the expectations of free and fair debate.

There are key provisions of the Model Code of Conduct that can guide councillors when making public comment and to assist in understanding what comment is not appropriate.

Part 3 of the Model Code of Conduct prescribes "general conduct"

²² <https://www.olg.nsw.gov.au/wp-content/uploads/2024/09/Councillor-Handbook-2024.pdf>

obligations councillors must comply with. Among other things, these provide that councillors must not conduct themselves in a way that:

- is likely to bring the council or other council officials into disrepute,
- is improper or unethical,
- causes, comprises or involves intimidation or verbal abuse,
- constitutes harassment or bullying behaviour (as defined by the code) or is unlawfully discriminatory.

Clause 7.6(h) of the Model Code of Conduct further provides that while councillors can critique and comment on the advice provided by staff, they must not make personal attacks on council staff in public forums including social media. Councillors also need to be aware of the duty they owe council staff and members of the community under the *Work Health and Safety Act 2011* to take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons.

Part 8 of the Model Code of Conduct prescribes councillors' obligations in

relation to the use and disclosure of council information. Among other things, councillors have obligations to:

- protect confidential and personal information,
- only release confidential or personal information if authorised to do so,
- not use confidential or personal information to cause harm to the council or anyone else, and
- not disclose confidential information discussed during a closed session of a council or committee meeting or any other confidential forum.

The provisions of Part 9 of the Model Code of Conduct are designed to ensure that complaints alleging breaches of the code of conduct are dealt with appropriately, fairly and confidentially and to prevent councils' codes of conduct from being weaponised. The relevant provisions prohibit making allegations about, or disclosing information about, suspected breaches of a council's code of conduct in public forums and disclosing information about code of conduct complaints that have been made.

What comment falls within the regulatory scope of a council's code of conduct?

A council's code of conduct only regulates conduct that is connected with a councillor's official role or the exercise of their official functions. It does not apply to conduct that occurs in a private capacity or that is not linked to a councillor's official role.

Any comment made by councillors in a private capacity does not fall within the regulatory scope of a council's code of conduct. However, a councillor cannot

simply avoid disciplinary action for a breach of the code of conduct by prefacing their comments with a disclaimer that what they are about to say is being said in a private capacity. If what a councillor says is clearly connected to their role as a councillor, then it falls within the regulatory scope of the code of conduct, even if it is made on a private social media platform or they do not identify themselves as a councillor when saying it.

How should councils apply their code of conduct to public comment by councillors?

The Model Code of Conduct was deliberately designed to align with the implied freedom of political communication. It should not be applied by councils in a way that impedes councillors' ability to engage with the community or to participate in robust

public debate on issues impacting on the council or the local community.

Councillors should refrain from engaging in personal attacks on their fellow councillors, council staff and others when commenting publicly.

However, it is entirely acceptable and appropriate for councillors to disagree with their council, other council officials and members of the community when making public comment.

Without the ability to disagree with others, councillors would not be able to participate in public debate or to engage in public advocacy on local issues, impeding their ability to exercise their functions as elected officials under the Act.

Disappointingly, in recent years, it is apparent councils' codes of conduct are increasingly being weaponised to discourage or punish councillors for making legitimate public comment.

A healthy democratic system of local government requires robust public debate on local issues. This leads to good decision making and ensures councils are accountable to their communities and responsive to its needs. Well-functioning councils should not fear healthy public debate. They should be able to explain and justify their decisions or, where they are not

able to do so, revisit their decisions to address legitimate community concern.

It is inevitable that councils, councillors, council staff and members of the community will disagree with, dispute or may even be offended by comments made by councillors when engaging with the community. Unless the comment involves a clear breach of the provisions of the code of conduct referred to above (e.g. because it is personally disparaging, abusive or intimidating), the code of conduct is not the appropriate mechanism for addressing that comment.

In a healthy, functioning democracy, the appropriate way to respond to public comment that others disagree with is to engage with that comment by publicly rebutting, challenging, or disputing it as part of legitimate public debate on the issue, not by making a code of conduct complaint about it.

Equally, councillors who initiate public debate by making provocative public statements cannot reasonably complain when others who dispute their comments publicly challenge them.

Can the expression of a councillor's views give rise to a conflict of interest?

Before being elected to council, many councillors will have been active community members and may have advocated on or campaigned on local issues or have been actively involved in community organisations that did so. This may be one of the reasons why they chose to stand for election to the local council.

The Model Code of Conduct expressly recognises this and has been designed to ensure that it does not operate in a way that prevents councillors from participating in decisions on matters simply because they have expressed a view on them or campaigned on them.

Clause 5.2 of the Model Code of Conduct provides that a councillor will have a non-pecuniary conflict of interest in a matter where a reasonable and informed person would perceive they could be influenced by a “private interest” when carrying out their official functions in relation to that matter.

Clause 5.3 further provides that the personal or political views of a council

official do not constitute a “private interest” for the purposes of clause 5.2.

What this means is that aside from any other interest in a matter, a non-pecuniary conflict of interest will not exist solely because a councillor has expressed a view on a particular issue or has publicly advocated or campaigned on it. Similarly, such a conflict of interest does not exist merely because a councillor is or was affiliated with a community organisation that has campaigned or advocated on a particular issue, unless the organisation - or any of its members the councillor has a close personal relationship with - has a separate material interest that would be affected by the council's decision.

However, councillors do need to be mindful that comments they make on matters before the council that could be seen to indicate they have formed an inflexible view on a matter, have the potential to make the council's decision on that matter susceptible to legal

challenge on grounds of bias because of prejudgement.

The leading legal authority on this is the NSW Court of Appeal case of *McGovern v Ku-ring-gai Council* (2008) (McGovern).³

Bias by pre-judgment will arise where the perception is that the position of the decision-maker is said to be “incapable of change”. This form of apprehended bias was central to the facts in *McGovern*, which considered the effect that the strongly expressed views of

two councillors had on the final decision reached by the governing body of the council.

What this means in practice is that councillors are entitled to express a view on matters before the council but not in such a way that would suggest in the mind of a fair-minded observer that they have pre-determined the matter and could not be persuaded to alter their position by the debate on that matter.

What protections do councillors have in relation to defamation?

As with other members of the community, councils and councillors can be sued in defamation for comments made in public forums such as council and committee meetings, in the media and on social media.

Unlike members of Parliament, councillors do not enjoy absolute privilege in relation to what they say at council and committee meetings. Absolute privilege provides complete protection for statements made during

parliamentary proceedings meaning that defamation proceedings cannot be brought with respect to such statements.

By contrast, councillors can be sued in defamation in relation to their statements at meetings. They are partially protected from defamation by the defence of ‘qualified privilege’, but only to enable them to speak freely and publicly in undertaking their duties at meetings. To be protected, any

³ *McGovern v Ku-ring-gai Council* (2008) 42 NSWLR 504

comment or statement a councillor makes at a meeting must be relevant to the council business, made in good faith and without malice.

As with statements made at meetings, councillors can also be sued in defamation for other public statements they make, including on social media. In the case of social media, councillors also need to be mindful that they may be considered a 'publisher' of any content uploaded onto a social media platform they administer and can be sued in defamation for that content. This includes content that is uploaded by a third party on the social media platform and/or that appears on their social media platform because the councillor has 'liked', 'shared', or 'retweeted' the content.

Section 731 of the Act provides councillors with a level of protection from civil liability action, including in relation to defamation, for undertaking council-related and council-endorsed activities as a councillor. Protection from civil liability is only provided where a councillor's actions are undertaken in

good faith and for purposes related to council activities.

This protection against civil liability is given effect under council's councillor expenses and facilities policies adopted under section 252 of the Act which allow councils to meet councillors' legal costs in defending proceedings in certain circumstances.

Consistent with section 731 of the Act, the OLG's 'Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors in NSW'⁴ state that councils' councillor expenses and facilities policies should only allow reasonable legal expenses to be reimbursed to a councillor for defending an action in defamation, provided the outcome of the legal proceedings is favourable to the councillor. It is not permissible for councils to meet the cost of defamation proceedings initiated by councillors or for seeking advice in respect of possible defamation, or in seeking a non-litigious remedy for possible defamation.

⁴ <https://www.olg.nsw.gov.au/wp-content/uploads/Guidelines-for-the-payment-of-expenses->

[and-the-provision-of-facilities-for-Mayors-and-Councillors-in-NSW-2009.pdf](#)

How is public comment regulated in council and committee meetings?

The meeting rules prescribed under councils' codes of meeting practice place some constraints on what can be said at council and committee meetings.

The Local Government (General) Regulation 2021 (the Regulation) and the Model Code of Meeting Practice for Local Councils in NSW identify certain types of behaviour at meetings as constituting an 'act of disorder'. A councillor commits an act of disorder at a council or committee meeting if they

- contravene the Act, the Regulation or the council's code of meeting practice, or
- assault or threaten to assault another councillor or person present at the meeting, or
- move or attempt 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 the committee, or address or attempt to address the council or the committee on such a motion, amendment or matter, or
- insult, make unfavourable personal remarks about, or impute improper motives to any other council official, or allege a

breach of the council's code of conduct, or

- say or do anything that is inconsistent with maintaining order at the meeting or is likely to bring the council or the committee into disrepute.

Where a councillor commits an act of disorder at a meeting, the chairperson may require the councillor to apologise without reservation for the act of disorder, withdraw an offending motion or amendment that constitutes the act of disorder or retract and apologise without reservation for a statement that constitutes the act of disorder. Where the councillor fails to comply, they may be expelled from the meeting.

The chairperson can require a councillor to address an act of disorder committed at an earlier meeting where the councillor failed to comply with the chairperson's direction at that meeting and can be expelled from meetings until such time that they comply.

Under reforms being considered by the Government, in the future, councillors may be also required to forego their monthly fee in any month in which they

have been expelled from a meeting for disorder.

Acts of disorder can also potentially constitute a breach of the code of conduct. While there are provisions in the Model Code of Conduct that relate specifically to behaviour at meetings, it is preferred that bad behaviour at meetings, is dealt with at the meeting at which it occurs by the chairperson under the disorder provisions, and that acts of disorder are not subsequently relitigated under the council's code of conduct unless the conduct is particularly egregious.

There are several reasons for this. The disorder provisions are a simpler, more efficient and cost-effective way of dealing with bad behaviour at meetings. It allows bad behaviour to be dealt with at the time it occurs and in the presence

of the public thereby ensuring the offending councillor is made publicly accountable for their behaviour.

Relitigating incidents that were addressed as disorder at the meeting it occurred through the code of conduct process, is not only a waste of council time and resources, but it also tends to suggest a misuse of the code of conduct process.

There are of course exceptions to this. Many of the decisions made by the OLG and the NSW Civil and Administrative Tribunal to take disciplinary action against councillors for serious misconduct have concerned conduct occurring at meetings and there will be occasions where the conduct in question is so egregious that stronger action than is available under the disorder provisions may be warranted.

What administrative arrangements apply to public comment by councillors?

Many councils have adopted media and social media policies that put in place administrative arrangements for engagement with the media and

managing councils' and councillors' online presence.

While its appropriate for councils to put in place appropriate administrative

controls for engagement with the media and social media use to manage legal and other risk and ensure the council is complying with its statutory obligations, these should not operate in a way that constrains councillors' ability to freely engage with the community via the media or online.

Council media and social media policies should not require councillors to seek the permission of staff before commenting in the media or online. However, councillors are encouraged to

The key principles that should inform councillors' engagement with the media or online are as follows:

- As a member of the governing body and as a representative of the community, councillors are free to express their personal views.
- However, when doing so, councillors must not purport to speak for the council unless authorised to do so and must make it clear that they are expressing their personal views as an individual councillor and that they are not speaking for the

check their understanding of the facts of a matter with staff before commenting on an issue in the media or online to ensure they have correct and current information.

To ensure that council media and social media policies are fit for purpose and do not unduly constrain councillors' ability to freely engage with the community, OLG has issued a best practice Model Media Policy and Model Social Media Policy which are available on its website⁵.

- council (unless authorised to do so).
- Councillors must uphold and accurately represent the policies and decisions of the council (see section 232(1)(f) of the Act).
- Councillors must not disclose council information unless authorised to do so.
- In the interests of promoting a positive, safe and harmonious organisational culture, councillors should endeavour to resolve personal differences privately and must not prosecute them publicly through the media or online.

⁵ <https://olg.nsw.gov.au/councils/governance/best-practice-governance-policies-consultations/>

Appendix 1: Key takeaways



Legal foundation

- The Australian Constitution implies a freedom of political communication, essential for informed democratic participation.
- This is not a personal right, but a limit on government power to restrict political discourse.
- Restrictions are only valid if they are appropriate and serve a legitimate democratic end.



Importance in local government

- Local democracy empowers communities to influence decisions about their future by electing representatives to local council.
- Public comment, including through media and social media, is central to fulfilling a councillor's role under the *Local Government Act 1993*.



Public comment and the Model Code of Conduct

- The Model Code of Conduct is aligned with the implied freedom of political communication.
- While councillors must comply with the code of conduct when commenting publicly, councils should not apply their

code of conduct in a way that impedes councillors' ability to engage with the community or to participate in robust public debate.

- Councillors should refrain from engaging in personal attacks on others when commenting publicly. However, it is acceptable and appropriate for them to disagree with their council, other council officials and members of the community when making public comment.
- The Model Code of Conduct only applies to behaviour related to a councillor's official role, not their private actions.



Conflict of interest

- Expressing a view or being affiliated with an advocacy group does not automatically create a conflict of interest.
- A conflict only arises if there is a material interest involved or a close personal relationship with someone who has one.
- Councillors must avoid prejudging matters, which could lead to legal challenges for bias.



Defamation and legal protections

- Councillors can be sued for defamation, including for social media posts.

- Qualified privilege applies to comments made in good faith when exercising council duties.

- Legal costs may be covered by council only if the councillor acts in good faith and wins the case.



Council and committee meetings

- The prescribed meeting rules prohibit acts of disorder at meetings.

- Councillors may be expelled for failure to comply with rulings by the chair in relation to acts of disorder.

- Preferably, acts of disorder should be addressed at the meeting, not through the code of conduct process — unless egregious.



Media and social media policies

- Council media and social media policies should not operate in a way that constrains councillors' ability to freely engage with the community via the media or online.

- Councillors should be free to express personal views but must:

- Not claim to speak for the council unless authorised.

- Accurately represent council decisions.

- Avoid disclosing confidential information.

- Councils should not require councillors to seek staff approval before commenting publicly.