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27 February 2025

Our Ref: 2025/133389
File No: X087882.001

Mr Brett Whitworth
Deputy Secretary
Office of Local Government
By email: olg@olg.nsw.gov.au

Attention: Council Governance Team

Dear Mr Whitworth,

Submission – New Model Code of Meeting Practice

Thank you for the release of the Consultation Draft and for the opportunity to make a submission on the proposed changes.

We request that this submission be taken into consideration together with our earlier submission dated 15 November 2024 on the Councillor Conduct and Meeting Practices Discussion Paper (copy enclosed). We note that in the discussion paper issued by the Office of Local Government (OLG) last year, there is no mention of the intention to achieve the changes to briefings through Regulation. Councils making submissions had no opportunity to comment on how the Regulation would be used, let alone the content of the it.

The NSW Government is strongly recommended to reconsider proceeding with the proposed new Regulation, or at a minimum, it should not be adopted before Councils have had an opportunity to review and be consulted on the new Regulation.

Promoting transparency, integrity and public participation

Restriction on briefing sessions

As set out in our earlier submission, the City of Sydney opposes the proposed restriction on Councillor briefing sessions.

Many of the indicators of good working relationships between councillors and staff espoused in the OLG Councillor Handbook, require a level of dialogue that is less formal and more collaborative than can be achieved via formal committee and council meetings.

One of the key roles of councillors as established under the Local Government Act 1993 s 223(2) is to consult with the CEO in directing and controlling the affairs of the council. Genuine consultation requires open and honest two-way discussions. Briefings and other open discussions between councillors and senior staff are essential for genuine consultation.

A similar mandating of consultation is seen in s 335(3) of the Act which requires the CEO to consult with councillors in the preparation of important strategic documents. One of the ways councillors can be better supported in their role is through collaborative discussions in workshops and briefings where they can freely ask questions and receive information that enables them to have confidence that the intent of their resolutions and policy decisions are being effectively implemented. Briefings are one of the most effective forums for councillors to ask for advice and discuss their position on key decisions, allowing them to receive advice from staff who are experts in the area, leading to more informed motions and decisions in meetings.

Briefing sessions enable a number of positive activities to occur. These include:

- The provision of required and additional induction and professional development training and familiarisation discussions, particularly for new councillors
- The effective provision of consistent information to all councillors on matters of interest, including from staff with subject matter expertise
- Open discussion on matters of policy, which are ultimately a matter for council, to assist staff as they are developing key strategic and policy documents
- Ability for staff and councillors to work on issues in a collaborative way, including issues which may not be the subject of a future report to or decision of council
- The provision of information by third parties such as State government agencies on upcoming projects or matters of particular interest to councillors ahead of public release

We note the difference in the role of the mayor and councillors, however the rationale for the distinction that a mayor can still receive briefings is unclear to us given that the majority of decisions are made in council meetings by all councillors.

An overall restriction on briefing sessions will be detrimental to the efficient functioning of the majority of well governed, ethical councils in NSW and is an over-reaction to the very small number of councils that have been exposed for acting unethically or even corruptly. The Office of Local Government should not regulate the entire industry based on the conduct of the lowest common denominator. If considered necessary, it would be more appropriate for the Office of Local Government to prepare mandatory guidelines to ensure there are clear expectations as to what is considered inappropriate or unethical practice in relation to staff and councillor briefing sessions.

The NSW Government is strongly recommended to reconsider proceeding with the proposed new Regulation, or at a minimum, it should not be adopted before councils have had an opportunity to review and be consulted on the new regulation.

It is challenging to see how legislation mandating such a ban could be drafted for practical implementation given the need for appropriate delivery of confidential transactional information, training information, confidential government information and other matters that will still require some sort of briefing session to take place.

Additionally, it is noted that once the foreshadowed regulation is in place there is a risk that council decisions may be open to challenge for non-compliance with those provisions. Section 374 of the Local Government Act 1993 currently preserves all decisions made in meetings, notwithstanding there may have been contraventions of the code of meeting practice. Similar protection would be required in relation to any new Regulation to ensure finality and certainty in council decision making.

If all provisions relating to the conduct of briefings are removed from the Code of Meeting Practice prior to the introduction of the Regulation being made there will be a lacuna for a period during which there will be uncertainty and a lack of clarity as to appropriate conduct.

Furthermore, it is requested that clauses 3.33-3.38 of the Code be retained.

In concluding, these comments are not intended to undermine the fundamental principle that council decisions and debates are appropriately conducted in public meetings. Whilst the City of Sydney fully supports the need for open decision making and meetings, council staff require the capacity to have conversations with councillors in forums outside of full, formal council meetings.

Requiring information considered at closed meetings to be made public after it ceases to be confidential (clauses 14.19-14.20 and clauses 20.20 and 20.21)

Whilst the City of Sydney does not object to the intent of this change, the administrative impact of its implementation as currently drafted needs to be understood and considered.

- What sort of consultation with the council is envisaged before making confidential information publicly available?
- How would this consultation take place, if not in a briefing?

The consultation requirement is impractical, and it is strongly suggested that it be removed.

It is noted that the confidentiality period for information will not always be readily apparent or based on a specific event occurring. In some circumstances, confidential information may include information such as trade secrets of third parties and the time at which this information can be made public may not be known to council staff. If these changes are implemented, councils will need to keep a register of such information and when it can be made public (assuming that information is known or able to be determined by Council staff), creating an additional administrative compliance obligation. We therefore request confirmation that these changes, if they proceed, would not be retrospective.

Promoting the dignity of the council chamber

Attending meetings in person (clause 5.19)

It is noted that the proposed amendments to the code of meeting practice significantly limit the circumstances in which councillors can attend meetings remotely. As you are aware, the majority of NSW councillors have full or part time employment in addition to their role as a councillor. From time to time, a councillor may need to be physically away from the local government area due to their other work commitments. It is requested that the list of reasons allowing audio visual participation in a meeting be extended to cover when a councillor is unable to be physically present due to a work commitment.

Depoliticising the role of the general manager

Responsibility for determining staff attendance at meetings (clause 5.44)

The suggestion that the council should determine staff attendance at meetings is impractical and is in contradiction of the fundamental notion in the Act and the Code of Conduct that councillors do not employ and cannot direct staff. Determining staff attendance at meetings should remain a matter for the CEO, consistent with their responsibilities for council staff under the Act. This is particularly important noting the work health and safety obligations of the CEO in relation to staff, including in relation to proactive management of risks to psychosocial safety.

Any concerns about how the CEO is dealing with this aspect of their role would form part of the ordinary performance assessment of the CEO by council.

Expenditure of funds – Mayoral Minutes / Notices of Motion (original clauses 9.10 and 10.9)

These two clauses should be retained. It is essential that the council is aware of the full costs and financial impacts of the decisions they make before they make them. This is an important aspect of due diligence and is central to section 439 of the Local Government Act 1993, which states that every councillor, member of staff of a council and delegate of a council must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under the Act.

To make decisions without properly understanding the financial impacts of the decision would be contrary to section 439 of the Act. The current process adopted by the City, which is for resolutions to be passed asking for the CEO to investigate specific requests, enables appropriate consideration of the financial of requests and an appropriate report to be brought forward, including recommending reallocation of funds or amends to the budget should that be required. The removal of this requirement in the Code of Meeting Practice is completely contrary to the requirements of the principles of sound financial management in s 8B of the Act and should not be progressed.

Simplifying the model meeting code

Holding meetings by audio visual link (clause 5.16)

This section of the Code should be expanded to enable the mayor and CEO to move a meeting to a fully online meeting where there is information to suggest a security threat that could impact the health and safety of councillors, staff and/or members of the public.

It is noted that where a council holds a meeting by audio visual link under clause 5.16, it is still required under section 10 of the Act to provide a physical venue for members of the public to attend in person and observe the meeting. This provision is nonsensical in the case of a pandemic or natural disaster and should be removed from the Act. During the Covid-19 pandemic this section compelled the City to have staff travel during periods of lockdown restrictions for the purpose of being on site to facilitate the opening of Sydney Town Hall to enable members of the public to watch a meeting on a screen. No members of the public attended these sessions. This was not only a waste of public resources but also exposed staff to unnecessary public health risks. It is strongly requested that amendments be made to enable a sensible exemption from the requirements of section 10 during extreme circumstances such a natural disaster impacting on the relevant local government area.

Urgency motions (clause 9.3)

We do not support the majority of the changes made in clauses 9.3-9.5. We question the requirement of the new clause 9.5 which requires all councillors to be present or unless a resolution is adopted, and the mayor also rules that the business is urgent (as per the existing provisions). It is unnecessarily complicated that there are different processes depending on whether all councillors are present. We are supportive of the requirement for the resolutions to include reasons for the urgency.

The existing provisions work well, and it is appropriate that the mayor (or alternate Chair) as chair of the meeting has a role in determining urgency for the consideration of business where notice has not been given.

Foreshadowed motions (clause 10.17)

We do not support the deletion of clause 10.17 which allows for foreshadowed motions in accordance with commonly accepted meeting practice. Furthermore, no rationale has been provided for this change. The current provisions work well. We question why foreshadowed amendments can be considered, but foreshadowed motions cannot.

Other changes to specific clauses in the Model Code

Questions (clause 9.17)

The City does not understand the reasoning for the removal of the word “respectfully”, particularly in the context of reforms which are purported to be directed at improving the dignity of the council chamber. We request that the word ‘respectfully’ be retained to reiterate to all participants in the chamber that discussions should at all times be conducted in an atmosphere of mutual respect. This is particularly important if the council is to meet its work health and safety obligations to staff, including protecting them from psychosocial hazards.

Voting on planning decisions (clauses 11.13)

These new provisions to ensure appropriate record keeping and documentation in relation to planning decisions are supported as they reflect the need for appropriate records of decisions made in this area. The City requests that consideration be given to how ‘inconsistent’ is defined for the purposes of this clause. It is assumed that this is not intended to capture minor changes or amendments to staff recommendations it may be worth considering whether it would be worth including a significance threshold in relation to this.

Points of order (old clause 15.2)

We would like to understand the reasoning for why the old clause 15.2 is being removed. This removal potentially allows for points of order to be misused and brings in the potential for points of order to be raised on very subjective matters. Points of order should be used to ensure the meeting is conducted in accordance with the code, and removing clause 15.2 to allow for points of order regarding meeting principles is contrary to the aim of restoring/maintaining dignity in the council chamber.

Acts of disorder (clause 15.10)

The proposed amendment to point (d) refers to “language, words or gestures that would be regarded as disorderly in the NSW Legislative Assembly”.

This reference is unhelpful and impractical. How are councillors and council staff to know what language, words or gestures would be regarded as disorderly in the NSW Legislative Assembly? Any inclusion of this nature should refer to a list or document that can be referred to (and which is presumably updated to reflect changing standards from time to time). In the absence of this information there is a very high likelihood of dispute on this matter.

We thank you for the opportunity to make this submission and look forward to receiving more detail on aspects of the Regulation and reiterate our request for more detailed consultation on the specific parameters of some of these initiatives before they are finalised and enacted.

We also wish to reiterate our comments in our earlier submission dated 15 November 2024, in relation to the other matters under consideration that are not part of this first tranche of changes.

Should you wish to discuss any aspects of this submission, please contact Kirsten Morrin, Executive Director Legal and Governance on (02) 9265 9361 or kmorrin@cityofsydney.nsw.gov.au.

Yours sincerely

Monica Barone PSM
Chief Executive Officer

Encl.
15 November 2024 City of Sydney Submission - Councillor Conduct and Meeting Practices

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15 November 2024

Our Ref: 2024/613044
File No: X087882.001

Mr Brett Whitworth
Deputy Secretary
Office of Local Government

By email: councillorconduct@olg.nsw.gov.au

Dear Mr Whitworth

Submission – Councillor conduct and meeting practices discussion paper

Thank you for the release of the Discussion Paper and for the opportunity to make a submission.

The City of Sydney supports the need for strong and effective local government. We appreciate that, as the level of government closest to the issues and people, how Councillors act, and how appropriately and transparently decisions are made, is critical to demonstrating accountability and transparency.

Principles of change

The City of Sydney generally supports the principles although there are many aspects of the specific details of the proposal which are unclear, or which should be the subject of further detailed consultation with the sector prior to implementation.

Noting there are many honest, ethical and hardworking councillors across the sector, the strength and effectiveness of our sector is reliant on addressing poor behaviours from those who are not so motivated.

However, we are concerned about the practical impacts of many of the suggestions raised in the Discussion Paper and the lack of detail put forward in relation to them. The City is concerned that the Office of Local Government (OLG) is proposing significant reforms to the way councils operate without adequate consideration of the impacts of those changes and without appropriate consultation across the sector, external regulatory bodies such as the Independent Commission Against Corruption (ICAC) and the community. Any amendments to the legislation, regulation or model codes of conduct and meeting practice must be the subject of full public consultation.

We make the following specific comments in relation to the Discussion Paper.

Potential changes to the code of conduct and oath of office

Q. What are your views about aligning the Oath of Office to the revamped Code of Conduct?

Aligning the Code of Conduct to the Oath of Office is supported, however it is requested that the Oath remain concise.

Potential changes to the definitions and assessment of councillor misbehaviour

One of the areas that must remain clear in any revised framework concerns councillor and staff interactions. We understand that you are not proposing to change the code of conduct in this respect for council staff, however the boundaries relating to interactions with staff need to be clear and enforceable for councillors.

It is unclear where councillor/staff interactions would be captured in the new framework. This is an important area of the code of conduct that supports the separation of roles and responsibilities for elected councillors and the council administration and as such should not be diminished.

Pecuniary and non-pecuniary interests

The Discussion Paper suggests that the definition of pecuniary interests for councillors will be amended to align with those used for NSW members of parliament. It is submitted that further consideration and consultation is required in relation to this proposal noting that:

- Any requirement to disclose income should maintain the current position that only the source of income is required to be disclosed, not the amount of income. For many councillors, their "other income" will be their primary source of income and a requirement to publicly disclose those amounts raises privacy concerns. It is also considered likely to discourage a broader range of potential councillors, including younger people working full time, from running as candidates.
- The position in relation to gifts would be a significant shift from the current position where councillors are prohibited from receiving gifts over a certain amount, to a requirement where they are only required to declare gifts over $500. While consistency of approach is supported, this should be a matter for further consultation and consideration, including with ICAC.
- Treatment of political donations as pecuniary interests requires further consideration and, in particular, there should be an alignment between the thresholds of reportable donations in the Electoral Funding Act 2018 and the requirement in OLG guidelines to publicly disclose the names of political donors.

The characterisation of non-pecuniary interests into categories of "significant" and "non-significant" is a matter on which further guidance and clarity would be useful. It is considered that the approach suggested in the briefing paper, including that tests of relevance for declaring a conflict include whether or not the matter is controversial or if the councillor has a casting vote, is not supportable. It is submitted that the OLG should instead work closely with the sector to develop clear guidelines and examples as to the appropriate treatment of non-pecuniary interests.

Q. Are there any other specific features that should be included to address concerns about councillors undertaking real estate and development business activities?

More detailed information is required to properly understand the changes being proposed in the discussion paper and it is recommended that this proposal be the subject of detailed consultation with external agencies such as ICAC as well as councils and the community.

One of the key issues that needs to be considered is how to avoid councillors simply divesting to family members, related entities, trusts and other arrangements, that create the perception of divestment but that do not actually remove the conflicts and risks. It is important that any requirement to divest is simple, clear and easy to monitor.

While it is unclear on the face of the proposal, it would be appropriate for the OLG to be the regulatory agency responsible for monitoring compliance with any obligations to divest. This would ensure consistency while ensuring appropriate levels of oversight are applied.

Q. Is this the appropriate threshold to face a Privileges Committee?

More detailed information would be helpful to properly understand the changes being proposed in relation to a Privileges Committee, including how this would work practically. Fundamentally, this City is concerned with the proposal for the establishment of such a body.

Some of the aspects that remain unclear and give rise to these concerns include:

- Who appoints the members of the Committee and how will OLG monitor and ensure the Privileges Committee reflects modern community standards and expectations for Councillor behaviour?
- Why is a new Committee required rather than referral to an existing body such as the NCAT which has experience in reviewing decisions relating to the application of particular professional standards?
- How will the potential for politicisation of the Committee be addressed?
- Who can refer a matter to the Committee via the webform (public, staff, councillors?)
- What is the threshold for a complaint?
- What will be the right of appeal from decisions of the Committee?
- Will legal representatives be permitted to represent and appear for clients before the Committee?
- Who will pay for the operations of the Committee and, if it is anticipated that councils will contribute, will the cost apportionment for the administration and operation of the Privileges Committee be based on a council's usage or a formula?

Overall, there are a number of concerns that arise from both the fundamental concept and the absence of detail in relation to the Privileges Committee. The details of this proposal require extensive consultation should it be proposed to proceed.

Q. What key features should be included in lobbying guidelines and a model policy?

It is essential to have clear definitions of lobbying and lobbyists, and what is and isn't acceptable lobbying.

The City of Sydney has a Councillor Meetings with Registered Lobbyists and Property Developers Policy which aims to ensure community expectations are met in relation to ethical and transparent lobbying of councillors. This policy requires councillors to record all meetings with registered lobbyists and property developers and the purpose of the meeting on a standard form. The information is published quarterly on the council's website and remains there for 12 months. This policy (copy attached) has its basis in the NSW model for state parliamentarians.

The administration of lobbying of councillors should not be onerous for councils to maintain and administer. The City of Sydney does not support a regime for lobbying that requires councils to maintain a register of lobbyists and/or requires lobbyists who propose to meet with councillors to complete a form, that needs to then be collected, stored, managed and disclosed by an additional council process. We understand this is one of the ways that some councils have chosen to respond to this issue to date, however we do not believe it is the simplest or most effective way to deal with this issue.

Dispute resolution and penalty framework

Q. OLG power to issue Penalty Infringement Notices - what level of PIN is appropriate?

It would be helpful if this aspect of the discussion paper could be more fully fleshed out. It is unclear what the purpose of the PINs are and when they will apply. In general, PINs are a way of dealing with criminal matters without the need for a criminal prosecution to take place. Therefore, it is assumed that what is proposed is to make certain behaviour of councillors a criminal offence that will be subject to a fine through the PIN process. Fundamentally, this appears to be problematic in that it criminalises the workplace behaviour of elected officials, although it may be appropriate in relation to some breaches by councillors.
It is difficult to provide comment in the absence of more information and it would be helpful to understand the proposed the administrative framework for the issue of PINs. Would PINs be issued directly to councillors (i.e. without the need for involvement by the council)? Any process which requires staff to potentially issue or administer PINs issued to councillors should not be adopted as it would not be appropriate for staff to be enforcing fines on councillors. Similarly, as PINs can be court elected and the matter proceed to a criminal hearing in the Local Court, it must be clear that the OLG is the prosecuting authority in these matters and council staff are not required to attend court and prosecute their councillors.

Restoring dignity to council meetings – proposed reforms to the Model Code of Meeting Practice

More detail is required to understand how these proposed changes might work and to identify any unintended consequences.

Our preliminary observations include:

- Will there be guidelines to assist mayors in using the proposed expulsion provisions to ensure consistent application?
- How will the right of review work? How is a request for review lodged and with whom? Who considers the right of review? What are the timelines for a review, noting the likely need for urgent consideration of these matters to ensure the right of councillors to participate in meetings is not withheld for an extended period while a review is underway?

- Is the loss of fee automatic on expulsion, or is this something a mayor will have discretion to decide?

On the basis of the information provided in the discussion paper, there are concerns about the proposal given the inherent risks involved in enabling a mayor to financially penalise other Councillors. There would need to be adequate safeguards to protect against the misuse of this power for political reasons, including to prevent councillors from attending meetings for months in a row. If such powers are introduced there must be stringent guidelines in place to ensure they are not misused, including making such misuse a breach of the Code of Conduct and the subject of sanctions.

Concerns are also raised about the potential impacts of financial penalties on Councillors, noting that there could be a disproportionate impact given the limited remuneration paid for the role.

With regard to members of the public, it is suggested that the Code of Meeting Practice could be amended to make it clear that the chair is empowered to ask for members of the public to be removed from the council chamber where circumstances so require. The physical expulsion of members of the public from the chamber for acts of disorder or refusal to leave should ultimately remain a NSW Police matter. Councils, whether staff or councillors, should not be empowered or expected to issue PINs to members of the public for these matters.

Members of the public enter council meetings freely. There is not necessarily a record of every person in attendance at a meeting, nor any way of knowing if those in attendance provide correct information if there is a sign-in process. There will be regular instances where the identity of a person causing an act of disorder is not known. The powers of the NSW Police to request and compel provision of identity information should appropriately remain with that entity.

Banning briefing sessions

The proposal in the discussion paper to impose a blanket ban on the briefing of councillors is not adequately explained or supported, impractical to implement and will ultimately lead to a more inefficient and combative environment for councillors and staff. Many of the indicators of good working relationships between councillors and staff espoused in the OLG Councillor Handbook, require a level of dialogue that is less formal and more collaborative than can be achieved via formal committee and council meetings.

It is important to remember that one of the key roles of councillors as established under the Local Government Act 1993 s 223(2) is to consult with the CEO in directing and controlling the affairs of the council. Genuine consultation requires open and honest two way discussions requires the opportunity for briefings and other open discussions between Councillors and senior staff (through the CEO). A similar mandating of consultation is seen in s 335(3) of the Act which requires the CEO to consult with councillors in the preparation of important strategic documents.

One of the ways councillors can be better supported in their role is through collaborative discussions in workshops and briefings where they can freely ask questions and receive information that enables them to have confidence that the intent of their resolutions and policy decisions are being effectively implemented. Briefings are one of the most effective forums for councillors to ask for advice and discuss their position on key decisions, allowing them to receive advice from staff who are experts in the area, leading to more informed motions and decisions in meetings.

Furthermore, briefings are the best forum to develop “relationships which are characterised by respect, good humour and good faith”, as is the aspiration of the OLG Councillor’s Handbook.

Council staff need to be able to have briefings with councillors that are closed to the public. The undertaking of these briefing sessions enables a number of positive activities to occur. These include:

- The provision of required and additional induction and professional development training and familiarisation discussions, particularly for new councillors
- The effective provision of consistent information to all councillors on matters of interest, including from staff with subject matter expertise
- Open discussion on matters of policy, which are ultimately a matter for council, to assist staff as they are developing key strategic and policy documents
- Ability for staff and councillors to work on issues in a collaborative way, including issues which may not be the subject of a future report to or decision of council
- The provision of information by third parties such as State government agencies on upcoming projects or matters of particular interest to councillors ahead of public release

There is no clear reasoning established in the discussion paper as to why a blanket ban on the briefing of councillors by staff would restore the dignity of council meetings or lead to the more efficient or effective conduct of council business. Further, it is challenging to see how such legislation mandating such a ban could be drafted for practical implementation given the need for appropriate delivery of confidential transactional information, training information, confidential NSW government information and other matters that will still require sessions to take place. In addition, there are a number of committees, panels and other bodies on which councillors sit together with NSW government and other representatives to make decisions or recommendations. These include local traffic committees and the Central Sydney Planning Committee. Briefings are regularly and appropriately given to those bodies by subject matter experts and, as is the case with Councils, this does not inhibit or prevent appropriate discussion of matters in public meetings.

This is not to undermine the fundamental principle that council decisions and debates are appropriately conducted in public meetings. Whilst the City of Sydney fully supports the need for open decision making and meetings, council staff still require the capacity to have conversations with councillors in forums outside of full, formal council meetings.

The example used in the discussion paper in relation to development applications is not applicable to the majority of councils in the metropolitan area, where councillors are not dealing with development applications due to the establishment of local planning panels. If the concern relates to development applications, we suggest that imposing a blanket ban on briefing sessions is not the appropriate mechanism for resolution. This would be far more detrimental to the operations of well-functioning, ethical councils than it would be for those in the minority who are using briefings for purposes that are not considered to be appropriate.

We look forward to receiving more detail on the aspects of the Discussion Paper which are proposed to proceed and reiterate our request for more detailed consultation on the specific parameters of some of these initiatives before they are finalised and enacted.

Should you wish to discuss any aspects of this submission, [redacted]

[redacted]

Chief Executive Officer