Code of Conduct for Council Members

LGA Submission
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About the LGA

The LGA is recognised as the peak representative body for Local Government in South Australia and is the voice of Local Government. The Association provides leadership to Councils and represents councils to State and Federal governments and other key stakeholders.

Review of the Code of Conduct

Since its introduction in regulation in 2013, the Code of Conduct for Council Members (the Code) has provided guidance for council members in carrying out their functions as public officials. In that time the code has served as both an educational tool and a deterrent to unacceptable behaviour. The overwhelming majority of council members and councils see benefit in retaining a Code in regulation, but with a number of significant improvements to raise the Code above mere behavioural issues. The Code should focus on substantive issues going to integrity, ethics and good governance.

The LGA strongly supports retaining the current code in place until a new replacement code and complaint handling process is brought into effect. This will provide time for the LGA to finalise and implement its new support strategies for councils - Prevention to Intervention.

Submission - the LGA submits that:

- The current Behavioural Code (Part 2 of the Code) is not effective. However a Code set in regulation should continue in operation but be re-focussed on genuine ‘misconduct’ issues. A new Code should be set higher level standards that ensure appropriate standards of integrity and enable effective sanctions to be imposed. The regulations should set out both the key standards and clear independent processes by which alleged breaches will be handled.

- Other legislative changes could include re-drafting section 62 of the Local Government Act, which sets out the general duties of council members, to include high level guiding principles of expected governance standards. This could set a framework for councils to manage the behaviour of council members generally. In addition, the role of the mayor as leader of the council could be legislatively strengthened, together with a strengthening of powers for mayors under the Local Government (Procedures at Meetings) Regulations 2013.

- Behavioural standards for council members should be addressed through councils with the support of the LGA. Proposed new measures include a new education and development program for council members, which is currently being progressed by the LGA. The new strategy, Prevention to Intervention, will include a revised role for the Local Government Governance Panel and options for councils to manage council member behaviour through internal processes.

These key submissions are elaborated further in the body of this submission.

Key Standards to Form Code in Regulation

Following consultation with council members, council CEOs and other key stakeholders, including the Ombudsman and the ICAC Commissioner, the LGA has developed some suggested new standards set out below. These standards focus on important standards of integrity and support good council decision-making.
Misconduct standards

1. Gifts and benefits
   - Redraft the current code provision to be simpler and more effective
   - Extend to perception that it is intended or likely to influence the CM in carrying out public duty
   - Include specific examples such as single bottles of wine or chocolates
   - Where it cannot be reasonably refused or returned, provide for prompt disclosure, and recording by CEO on register

2. Bullying and harassment
   - Include provision with definition:
     
     *eg Bullying occurs when:

     A person or group of people repeatedly behaves unreasonably towards a council member or council employee and the behaviour creates a risk to health and safety. It may include offensive or inappropriate behaviour inside or outside council meetings.

     Bullying does not include reasonable action carried out in a reasonable manner or robust debate within councils that is conducted courteously.

   - This should include a provision to ensure that the increasing use (and potential for misuse) of social media and associated platforms is regulated through this standard.
   - Should provide for possibility of investigation by Safework SA

3. Compliance with mandatory training requirement
   - Failure to comply with mandatory training requirements should be treated as misconduct
   - LGA to review and revise Training Standards to include training on code and misconduct issues

4. Council members not to direct council employees (other than appropriate direction to the CEO)
   - Extend to not using position to influence council employees
   - Include not directing or influencing council employees in any public or private forum

5. Repeated non-compliance with meeting procedures or rulings by the presiding member

6. Complaints that are not made in good faith, made primarily for a mischievous purpose or made recklessly or maliciously or giving false or misleading information to an investigation
Proposed Processes for Managing Complaints

The processes for managing complaints should be stated in the Code and include the following principles:

1. The Ombudsman should investigate alleged breaches of the Code, as is currently the case for 'misconduct' complaints. The Ombudsman should have an 'own motion' option to refer bigger cases, after preliminary investigation, directly to other agencies, including SAPOL and SACAT or to refer a matter for prosecution if warranted.

2. Complaints should undergo an independent initial assessment prior to referral to the Ombudsman (this could be a formally recognised role for LG Governance Panel).

3. Complaints should involve an initial mandatory independent conciliation or conferencing process before proceeding further (this could be a formally recognised role for the Local Government Governance Panel, the Ombudsman or South Australian Civil and Administrative Tribunal (SACAT) conciliators. The process should be confidential without lawyer representation).

4. The Ombudsman should be required to make a mandatory recommendation for penalty, following investigation.

5. Council must comply with Ombudsman’s recommendation or provide a written explanation as to why it hasn’t (then procedures as currently exist can be activated under the Ombudsman Act—eg report to Parliament).

6. Caretaker period protection – a complaint will not be dealt with during the caretaker period and the complaint will not be publicly disclosed.

7. If a council member found in breach fails to comply with a penalty it should trigger an immediate escalation to SACAT.

8. Complaints must be made within 3 months of the action complained of. If a council member resigns or is no longer a council member a complaint will lapse. Anonymous complaints will only be dealt with if they raise serious issues and contain sufficient information to support further action.

Sanctions/Penalties

Ombudsman to have power to impose following penalties:

- Formal reprimand
- Requirement to publish apologies, similar to ‘adverse publicity’ orders;
- Require (not simply request) public apologies (written or verbal)
- Ability to suspend Council Members from meetings for up to three (3) meetings of Council (which shall not trigger a vacancy of office under the Act)
- Payment of costs associated with a Council Member’s action.
- Mandatory training
Review Right – SACAT

There could be a right of review to SACAT in relation to an Ombudsman finding or recommendations.

SACAT, rather than the District Court, should be able to apply higher level disciplinary measures for significant misconduct, which could include:

- Suspension for a significant period of time
- Disqualify a person from holding any office under the Act
- Imposing a fine
- Reimburse Councils up to a set maximum figure
- Disqualify a person from becoming a member of a council, council committee or subsidiary for up to 5 years.

Legislative Changes to Support Councils

Local Government Act 1999 Proposed Amendments

The Local Government Act currently contains a distinction between the role of the mayor and the role of councillors. The LGA believes that this distinction could be strengthened to provide the mayor with a clearer leadership role with concomitant powers. For example, drawing from the experience in Victoria, the Mayoral functions could include a function to provide guidance on Code compliance for Council Members. This could involve providing the Principal Member with the codified leadership authority to support and assist Council Members as to what is expected of them in behavioural terms. A legislative statement requiring Councillors to ‘observe the principles of good governance and act with integrity’ would underpin the standard expected.

In addition, the general duties currently set out in section 62 of the Local Government Act should be reviewed and revised to establish a more coherent framework for Council Members and include high level governance principles as a guide to expected behaviour. At present, section 62 contains a number of ‘offence’ provisions which are inconsistent with a ‘general duties’ section and could be more fruitfully located in a Code.

The following offence provisions could become misconduct provisions and arguably be more effectively managed by avoiding the necessity for a criminal prosecution. These include:

1. Making improper use of information acquired as a council member [s 62(3)]
2. Making improper use of his or her position as a council member [s 62(4)]
3. Releasing confidential information which is subject to an order under s 90 [s 62(4a)]
4. Material conflict of interest [s 74(1)].

The treatment of these offences as ‘misconduct’ could be done simply by including a provision in the code to say that an allegation of an offence under these sections may be dealt with as misconduct under the Code. Alternatively these offences could be removed from the Act, recast as misconduct under the code in a full revision of section 62.
Local Government (Procedures at Meetings) Regulations 2013
Proposed Amendments

The Local Government (Procedures at Meetings) Regulations contain measures for dealing with disruptions at council and committee meetings. These are also offence provisions and could also be more usefully contained in a Code, in so far as they relate to council members. The provision relating to members of the public could be amended to provide for a council to clear the gallery in situations in which a member or members of the public persistently disrupt council meetings and to close the remainder of the meeting to the public.

LGA Strategy to Support Councils – Prevention to Intervention

The LGA considers that council leadership, behaviour and morale cannot be solely managed through intervention. Rather it needs to be seen as a continuum of strategies from prevention through to intervention.

LGA’s Proposed Action

Therefore the LGA, in consultation with councils, intends to develop a new model for assisting councils to manage the conduct of council members that gives a higher emphasis to ‘prevention’. Council members are required to uphold the objectives of the Local Government Act and act in accordance with their prescribed duties.

Councils have a responsibility to demonstrate leadership in good governance. Proactive approaches are taken by the majority of Councils to ensure good governance practices and performance.

In the context of behaviour management, prevention strategies are the procedures and processes that councils and council members can use to ensure they promote good governance and avoid engaging in non-constructive and disruptive behaviour.

Methods of intervention are also scalable from ‘early intervention’, to avoid a contravention of a mandatory Code, through to enforceable action and penalties for misconduct.

There are exemplary preventative strategies currently being used by the sector which the LGA will build upon.

Expanded Role for Local Government Governance Panel – Proposed LGA Member Service

The LGA provides access for councils, as a member service, to a Local Government Governance Panel to assist councils in managing complaints under Part 2 of the current Code. The Local Government Governance Panel is currently managed by Kaye Smith, partner in law firm EMA Legal. The Panel’s role at present is to provide an initial assessment of complaints referred to it under Part 2 of the existing Code and to investigate complaints where an investigation is warranted.

The Panel is well placed to continue its role of supporting councils which experience poor behaviour from council members which requires external management and intervention. A referral to the panel would not require a separate code of conduct. Rather, assessments could be made against the high level governance principles recommended for inclusion into section 62 of the Local Government Act. Or, in the event that this framework does not proceed, the
Governance Panel could simply assess behaviour against accepted norms of community standards for public officials.

The Panel's role is expected to include: initial conferencing and conciliation; assessment and recommended action; and, as a last resort, investigation and recommendation for council censure in the event a breach of community standards of behaviour is substantiated on objective grounds.

**Council Committee: Internal Council Management of Council Member Behaviour (Council led initiative)**

Some councils have established a council committee, comprising a small number of council members and people with relevant expertise, to ‘peer manage’ complaints about council members’ behaviours. The LGA believes that, for councils that want to take this path, this idea could be further developed and implemented as an internal management solution.

**Regional Committee: Shared Service Approach to Management of Council Member Behaviour (Council led initiative)**

This option is similar to the council committee structure, but implemented on a regional scale. The idea could be developed further for regional areas.

**Conclusion**

The LGA consulted widely with Mayors, Council Members and CEOs in particular, together with other key stakeholders including the Ombudsman and the ICAC Commissioner. The approach taken here, which is an integrated package of reforms, has been endorsed by the LGA Board.

There is strong sector support in local government for a regulated Code of Conduct. Councils that have not had any complaints under the Code and have not needed to have recourse to the Code in a disciplinary sense, have reported that a Code provides an excellent framework and set of expectations for Council Members that plays a useful educational role. Those Councils which have needed to activate the provisions of the Code as a result of complaints, have reported that the Code requires improvement and more effective sanctions, and these views have assisted in the formulation of the proposals set out in this submission.
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