



SUPPLEMENTARY BUSINESS PAPER

(Late Item Memo No. LM10/24, Item 3.)

GENERAL MEETING

**Wednesday 13 November 2024
at 6:30PM**



TABLE OF CONTENTS

SUPPLEMENTARY ITEMS

Item 3	LM10/24 Further Amendments to the Submission to The Office of Local Government - Discussion Paper.....	1
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ITEM 3 GM57/24 - Councillor Conduct and Meeting Practices - A New Framework

Additional information with CHANGE to Recommendation

Since the publication of Late Item Memo No. LM9/24, further amendments to the draft submission to the Office of Local Government regarding the proposed changes to the Code of Conduct and Meeting Practices – A new framework, have been created. Attached is the final draft submission to the OLG.

RECOMMENDATION

THAT the draft submission in response to the *Discussion Paper – Councillor conduct and meeting practices*, attached to Late Item Memo No. LM10/24 be adopted and referred to the Office of Local Government.

STEVEN HEAD
General Manager
Office of the General Manager

Attachments:

- 1.  Final - Draft Submission to the OLG - Councillor Conduct and Meeting Practices

File Reference: F2005/00156
Document Number: D09010702



OFFICE OF THE GENERAL MANAGER

14 November 2024

OLG Strategic Policy Unit
Locked Bag 3015
NOWRA NSW 2541

Dear Sir/Madam

Councillor Conduct and Meeting Practices – A New Framework

Thank you for providing Hornsby Council the opportunity to make comments on the proposed new framework for councillor misconduct and meeting practices. This submission was formally endorsed by the Council at its meeting on 13 November 2024.

At the outset it is important to acknowledge that Hornsby Council has not had an adverse history of serious councillor misconduct or dysfunction at Council meetings which would be the impetus for this current review by the OLG. Notwithstanding, we have dealt with some misconduct matters which have warranted proper consideration, albeit not to the same extent as have been experienced by some other councils.

Set out below are each of the questions you have posed in your Discussion Paper, and Council's response:

1. Are we missing anything in the principles of change?

No. We are satisfied the principles stated in the Discussion Paper broadly address the intent of the proposed changes. Some clearer definition may be warranted as to the reason why the proposal is required, but the general principles as outlined are broadly supported. This broad support is qualified, as further detail is sought on some aspects of the proposal and this is outlined in responses to the questions below.

2. What are the key elements of an aspirational Code of Conduct that should be enshrined?

We have reviewed the NSW Members of Parliament Code of Conduct which was referenced in the Discussion Paper and note the key headings are Improper influence; Use of public resources; Use of confidential information; Limitation on breach of Code; Disclosure of Interests; Conflicts of Interest; Gifts; Upholding the Code; and Treatment of staff and others. These headings already have close alignment with the provisions of the existing OLG Model Code of Conduct for local councils and we are satisfied that no further elements would be required if an aspirational Code was developed for local councils. Given the direct alignment between decisions of the Council and implementation/action on the ground, including direct relationship with regard to some planning matters and delivery of facilities and services, it is considered that the Code may be better aligned to the Code for Ministers of the Crown rather than the requirements for members of the House of Representatives and Legislative Council.

Hornsby Shire Council

ABN 20 706 996 972
296 Peats Ferry Rd, Hornsby 2077

PO Box 37, Hornsby NSW 1630

Phone 02 9847 6666

Email hsc@hornsby.nsw.gov.auWeb hornsby.nsw.gov.au**ATTACHMENT 1 - ITEM 3**

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

This initiative is supported as it will strengthen the importance of the Code, although the difference it makes may be inconsequential.

With respect to the comments in the Discussion Paper about seeking to no longer restrain the ability of a councillor to speak publicly on matters pertaining to their council, even when in disagreement with or in criticism of the majority, this is noted with some concern by our Council. Widely divergent views of councillors being expressed following a Council decision is hardly likely to engender confidence in the institution and may well be confusing for both community and staff. Additionally, we believe it is important to address how dissenting councillors would talk to motions of their council's at forums such as the Local Government Conference. It is not inconceivable that the councillor delegates attending such a forum could hold an alternate view of the elected-council and thus seek to withdraw a valid motion submitted by their council.

4. Is the proposed pecuniary interest framework appropriate? Is anything missing?

The list of pecuniary interests defined for NSW Members of Parliament, as set out in the Discussion Paper, already closely align with the current list in the OLG Model Code of Conduct. The only exception is that councillors are currently required to disclose if they are a property developer or close associate of a property developer and it is unclear if this remains in the new pecuniary framework.

It is our view that this current disclosure requirement should be retained unless there are other effective mechanisms adopted to address concerns about councillors undertaking property development activities. Further, we support the alignment of disclosure obligations for members of parliament with this requirement.

While not a consideration in the Discussion Paper we also believe the new legislative framework should provide that the place of residence of a councillor (and also of senior officers) is not subject to publication on a council's website. The broadcasting of this information does raise serious personal safety concerns. Information about actual place of residence should only be available by way of a GIPA application to the council. Retention of the information by the council (albeit not automatically public) is otherwise supported.

5. Do you agree with the principles of what constitutes a significant or major non-pecuniary interest?

Yes. The proposed principles still retain the "objective test" where such interests must be considered from the perspective of a reasonable and informed third party, and not in the mind of the councillor who has the conflict.

An opportunity for strengthening the Code with respect to non-pecuniary interests would be the inclusion of new clauses to emphasise that conflicts of interests should be disclosed at all points of engagement with council staff and the community, and not just when the councillors are in their decision-making capacity at a council meeting. Clause 5.2 of the OLG Model Code of Conduct refers to the obligation to disclose a conflict of interest when carrying out "official" functions. This language suggests the disclosure obligation only arises upon a councillor when in their decision-making role at a council meeting. However, significant engagement by councillors occurs outside the council meeting process, in areas such as constituent referrals and advocacy. It would be a positive enhancement to the Code to clarify that the proactive disclosure of non-pecuniary conflicts should be made in all circumstances.

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

We acknowledge the motivation for the proposed legislation to manage the inherent conflicts of councillors undertaking real estate and property development activity. In the absence of any draft legislation at this point we are limited in our ability to provide a detailed response. A question which does arise from the Discussion Paper, however, is whether the obligation to divest and not enter into real estate or development business arrangements will only apply to the Local Government Area the councillor is representing, or would this apply universally?

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

Yes. The Discussion Paper proposes that the misbehaviour definitions be limited to: is unbecoming of a councillor, brings council into disrepute, and is assessed as being outside the norms and expectations of a sitting councillor. We support a Privileges Committee having these strict criteria for review of misbehaviour.

It is foreshadowed that the Privileges Committee would comprise of mayors and ex-mayors supported by OLG staff. We see the involvement of mayors and ex-mayors as being problematic as either an adverse or favourable adjudication of the Committee will be open to allegations of political bias. The perception will be that politicians are appraising the actions of other politicians. We believe that the Committee would be better served by person/s independent of the political process such as retired judges, retired senior public servants or probity experts (such as current conduct reviewers).

It is also not clear from the Discussion Paper what administrative and financial requirement will be placed on councillors or councils, except that there will be a cost for management of complaints by the Privileges Committee. If costs are not reduced through the new framework, then the current system may be preferable.

8. How else can complaints be minimised?

We do not believe the new framework should openly seek to dissuade complaints. This would be contrary to the position promoted by other agencies such as ICAC and the Ombudsman where an open stance is expected on the receipt of any complaint. Rather than seeking to minimise complaints there needs to be a very efficient triage process whereby the lower order complaints are still acknowledged and recorded, if not otherwise progressed to investigation. The Queensland model is often mentioned as having a very effective triage process. A one-off minor complaint may still have value if other complaints are received about the same councillor in future years. For this reason, we would suggest that when lower order complaints are not progressed to investigation, complainants are still thanked for their notification and assured that their information remains on file for future reference if required.

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

Our view is that any guidelines or model policy on lobbying should clearly separate "landowner lobbyist" activities from other lobbying activities. With respect to landowner lobbyists the guidance should then not be limited to professional lobbyists but to the following:

- a person (or representative of a person) who has a land-ownership interest within a precinct nominated, or proposed to be nominated, for review by Council which may lead to possible amendment of the LEP;

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- a person (or representative of a person) who has a land-ownership in an adjoining or nearby parcel of land to a precinct already under review, or proposed to be under review, by Council and who may be seeking to include such parcel of land into the precinct;
- a person (or representative of a person) who has a land-ownership interest in land which they would like to be re-zoned and therefore would require an amendment to the LEP;
- a person (or representative of a person) who has a vision or concept plan for development of a parcel of land anywhere in the LGA and which would require an amendment to the LEP for the development vision or concept plan to be achieved.

We propose this wider interpretation of landowner lobbyist because any individual landowner, or group of adjoining landowners, can still make windfall gains from an uplift in land zoning without engaging a professional lobbyist. This is also the area of lobbying which causes most concern to the community. This is not to suggest that upzoning is inappropriate, just that the guidelines should be clear for all parties concerned.

Other lobbying activities are generally lower risk so should be considered separately within future guidelines.

10. What level of PIN is appropriate?

If a Penalty Infringement Notice (PIN) was to be utilised in circumstances where a breach is considered minor or administrative in nature we would recommend the value be set at a percentage of a councillors/mayoral fee, rather than a fixed amount. This would account for the differential fee structure between councils in NSW.

A system similar to that which operates in respects of driver's licence demerits could also be investigated.

11. Are the penalties proposed appropriate, and are there any further penalties that should be considered?

Yes. We are satisfied that the proposed misbehaviour penalties of censure of the councillor; warning of the councillor; loss of sitting fees; or referral to the appropriate tribunal or body for more serious sanction such as suspension or disallowance, are appropriate.

12. Are the existing sanctions available under the Local Government Act sufficient?

We have taken this question as a reference to the provisions of sections 440B to 440k of the Act. Overall, we consider the existing sanctions are sufficient, but acknowledge we have not had misconduct matters of such a serious nature to enable us to have an informed view about all the sanctions currently available.

13. Should decisions on sanctions for councillors be made by the Departmental Chief Executive or a formal tribunal with independent arbitrators and a hearing structure?

The case for decisions on sanctions being made by a formal tribunal, with independent arbitrators and hearing structure, is well made in the Discussion Paper and is supported.

14. Are there other powers that need to be granted to the mayor or chair of the relevant meeting to deal with disorderly behaviour?

We are concerned that the proposed framework forces a large amount of responsibility and power onto mayors. This in turn could reduce their capacity to maintain positive working relationships with the elected-council. The

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proposed powers for mayors to expel councillors from meetings and suspend their payments may place an additional burden on mayors and should be considered carefully.

There is also the inherent risk that mayors may take a different perspective on expulsions and suspensions depending on whether they are popularly elected or elected by the governing body.

We also believe that issuing of PINs to members of the public who refuse to leave Council Chambers should be a last resort. Perhaps NSW Police may be best placed to issue PINs after review from the mayor.

Overall, these proposed reforms could create an environment whereby there is an abuse of power by some mayors, hence safeguards to protect against this should be fully considered. In the absence of such, it is difficult for us to indicate how it could work successfully hence our support is not forthcoming for this specific proposal.

15. Are there any other measures needed to improve transparency in councillor deliberations and decision making?

The Discussion Paper infers that the practice of holding pre-meeting briefing sessions is an unsanctioned practice which has recently emerged in the sector. This is not a fair representation because this practice is formally identified in the OLG Model Code of Meeting Practice. Nevertheless, it is our view that there should be no change to the current arrangements. If such briefing sessions are banned, however, we would expect the ban would only extend to briefings on finalised reports which are being tabled at upcoming Council meetings, and not draft reports where matters are still being formulated.

It is important to recognise that these out-of-public briefings with councillors are not a forum where debate or decision-making occurs. Rather these sessions provide the best opportunity for staff to provide the substantial background needed (often several hours of content over an extended period) for councillors to make the most informed decision at the Council Meeting. Public attendance at these forums would place constraints on the type of information that staff could provide and the questions that councillors could ask. Public attendance also has the potential to trigger community activism well before objective information on the risks and benefits of options have been considered.

There is also a considerable administrative burden which needs to be considered if these sessions were open to the public. Under the proposal, councils would need to give public notice of briefings, prepare and publish minutes, webcast meetings, and carry all of the additional administration required to host, manage and record the proceedings of public meetings. Councils would also need to address relevant legal obligations such as privacy and confidentiality.

The proposal that the mayor be given preferential rights of access through informal discussion with the General Manager is also inconsistent with best practice decision-making. All councillors should be provided the same information on equal terms. A likely downside of such a proposal is that senior management may be requested to provide individual briefings to individual councillors and this will be a substantial time burden.

Nevertheless, the objective of ensuring transparency and participation in the decision-making process is supported. This submission suggests that the current arrangements be allowed to continue with additional safeguards in place. Notes of such meetings could be provided on councils websites post the meeting and any subsequent report to council should outline whether informal discussion between councillors and staff has occurred, and the context of those discussions.

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Further amendments could include some specific allowance of items that can be discussed in such settings but prohibiting certain other items. Perhaps a requirement could be to formally require matters of significant public interest to be "called" by the mayor, a majority of councillors or the council's General Manager to be presented in a public forum and invite public comment before decisions are made. In summary, the Minister's stated aims are supported.

In order to get this right for the benefit of communities, councillors and staff it is suggested that a working party of experienced practitioners, including mayors and general managers, work with the Office of local Government to identify workable and efficient proposals that address the Minister's stated aims.

We trust the above responses provide sufficient detail to assist in your further policy development. We thank you for the opportunity to comment and please do not hesitate to contact me if you have any further questions about our submission.

Yours sincerely

Steven Head
General Manager

TRIM Reference: F2005/00156

ATTACHMENT 1 - ITEM 3