



Mr Ross Woodward
Chief Executive Officer
Division of Local Government
Lock bag 3015

The Greens NSW Submission Re: Code of Conduct Review

1. Thank you for taking the time to review the problematic local government Model Code of Conduct. The Greens NSW support the general thrust of the reforms but have some specific comments as to the reforms proposed. These are detailed below. For convenience we adopt the numbering used in the October 2011 position paper.

4.1 Proposed changes to the prescribed standards of Conduct

4.1.1 Changes to the political donation provisions

2. The Greens NSW welcome the direction of these amendments which close some of the loopholes that allowed councillors to redirect donations through their party's head office and thus avoid declaring conflicts of interest on matters involving donors to the councillor's party.
3. We look forward to reviewing the specific wording of the amended Code in due course.

4.1.2 Provisions relating to the management of a loss of quorum

4. These changes to allow for exemptions to be obtained from the Minister to allow councillors to vote at meetings where they have a pecuniary interest are not required and would unnecessarily duplicate an existing provision in s458 of the *Local Government Act* that reads:

458 Powers of Minister in relation to meetings

The Minister may, conditionally or unconditionally, allow a councillor or a member of a council committee who has a pecuniary interest in a matter with which the council is concerned to be present at a meeting of the council or committee, to take part in the consideration or discussion of the matter and to vote on the matter if the Minister is of the opinion:

- (a) that the number of councillors prevented from voting would be so great a proportion of the whole as to impede the transaction of business, or*
- (b) that it is in the interests of the electors for the area to do so.*



5. Further there is a proposed *Local Government Act Amendment Bill* currently before the Parliament that further refines this matter, including with proposed amendments from non-Government parties. The Greens therefore do not support these changes to the Model Code.

4.1.3 Prohibition of binding caucus votes

6. The Greens strongly support prohibition on binding caucus votes for decisions to be made by councillors in respect of development applications. There has however not been a strong case made to generally prohibit binding caucus votes on other matters. Indeed the ramifications of such a change, including the near impossibility of proving or disproving such a matter, makes the general application of such a prohibition likely to do more harm than good at a local level.

4.1.4 Expansion of scope of the provision relating to use of council property or facilities for re-election purposes

7. The Greens support expanding this prohibition. There will need to be some care taken in the drafting to take into account the fact that often matters that are dealt with at a local level have political ramifications at a State or Federal level and therefore, unintentionally or not, actions taken by local councillors can be seen to indirectly benefit or hinder other political campaigns.

4.1.5 Provisions relating to lobbying

8. We support increased levels of scrutiny regarding lobbyists. This should also include a publicly searchable register of such meetings (online).

4.1.6 Relationships between council officials

9. The Greens support the provisions regarding further proscribing interactions between council officials.
10. There are good arguments to propose that General Managers and Directors should also be obliged to disclose any formal political affiliations.
11. Care needs to be taken to recognise the part-time and community-based nature of a councillor's role when limiting meetings between "developers" and councillors to being either at council or with a third party. Put simply, many developers are just residents with DA's who councillors run into on the street, at the shopping centre or at sporting events.
12. There is significant difficulty in prohibiting one-on-one 'meetings' with developers when much of the contact is by telephone where a third party cannot in practice be in



attendance. No councillor can stop incoming calls, nor should they. This matter is not easy, but a blanket prohibition on one-on-one contact with developers may well prove to be both unworkable and undesirable given the role of a councillor as a community representative.

13. Equally there are circumstances that should be proscribed under the Model Code – restaurant 'meetings', attendances at lavishly catered events and the like are all matters of genuine concern. Introducing greater disclosure requirements is one way of addressing the some of the more mundane day-to-day contacts with developers.
14. The proposed amendments to clauses 9.7 and 9.8 of the model code regarding industrial and employment matters are not supported. This is for two principle reasons:
 - i. Employees must be able to discuss and raise employment grievances and claims amongst themselves, and most importantly, with their union(s). This proposed amendment would in effect prohibit that. Not only is this very poor public policy and against numerous international conventions allowing for the right of working people to be collectively represented, it is also most likely *ultra vires* any regulation making power under the *Local Government Act*. Further it is in direct conflict with the freedom of association provisions in the *Industrial Relations Act* in Chapter 5 Part 1 of the Act, and in particular section 210.
 - ii. Second, as a matter of principle and law, councillors must have a role in setting the industrial framework for a council. This is a necessary part of their role as, in effect, the board of directors of a council. Again any attempt in the model code to circumscribe the role of councillors is likely to be found *ultra vires* for reason of being in direct conflict with an express provision in the *Local Government Act* contained in Chapter 9, Division 2, Part 3, but especially s232.
15. For the above reasons, if these provisions regarding employment and industrial matters were to be inserted into the Model Code and ever used, then they would likely lead to substantial legal expenses and uncertainty when tested. This is not in the best interests of the local government sector. In short this proposal is poorly conceived and should not be progressed.

4.1.7 Gifts and benefits

16. The Greens support clarifying and tightening the provisions regarding the prohibition on monetary gifts.



17. As to disclosure, a modest monetary threshold of, say, \$40.00 might well be in order to encourage councillors to attend community lunches and dinners and to prevent Councillors and officers from having to undertake the paperwork, and council to spend the resources to track, essentially immaterial matters.
18. Further, the obligation to disclose all instances in which a councillor has refused a benefit (such as having refused an invitation to a community event) is not workable or desirable in practice and will likely lead to many unintentional breaches of the Code. On the other hand, refusal of more substantial gifts, such as tickets to sporting events or holidays, should be disclosed as potential corruption attempts.

4.1.8 Application of the Code of Conduct to contractors

19. We support the Code being extended to include contractors and subcontractors and are pleased to see that annual complaint statistics will be reported by the Regional Panel Coordinator.

4.2 Proposed changes to the administrative framework

4.2.1 A regional approach to the administration of complaints

20. A regional panel for reviewers is welcome and timely. However given the broad pool of candidates available for a regional panel there is no rationale for allowing persons under a current or recent contract with a council to be on a panel.
21. From reports under the current system, the fact that a Code of Conduct reviewer has contracted recently with a council creates in the person the subject of the complaint a sense of bias. This is not an unreasonable apprehension of bias.
22. Conflicts of interest reduce the legitimacy of any process. The Code itself recognises this regarding councillor's behaviour and there obviously should be no lesser standard applying to those interpreting and applying the rules. This proposed change is not appropriate, even noting the modest safeguards proposed.

4.2.2 The management of the performance of conduct reviewers

23. A regional panel co-ordinator is an improved way of dealing with concerns regarding the performance of conduct reviewers. Clearly some detailed provisions supporting the genuine independence of such an officer will be required in the model code.



4.2.3 The appointment of complaints coordinators

24. Having a person other than the general manager undertake the role of complaints coordinator is an improvement. Again some detailed provisions supporting the genuine independence of such an officer will be required in the model code.

4.2.4 The appointment of complaints assessors

25. No General Manager should undertake the role of complaints assessor. General Managers serve at the political will of a majority of councillors, and they often have personal and professional relationships with neighbouring General Managers. Therefore they should have no role in code of conduct complaints either for their Council or other Councils.
26. A superior model would have a regional complaints assessor(s) appointed by a competitive tender process at a Regional Organisation of Councils (ROC) level. Any modest costs savings from having a neighbouring General Manager undertake this role are more than offset by the prospect of political decision making, or at the very least, a reasonable apprehension of political decision making.
27. Finally, with a salary of approximately \$250,000 p.a. General Managers are not a cost-effective resource to use as complaint assessors, and they may well not have the appropriate skill set to most effectively perform this task.

4.3 Proposed changes to procedural requirements

4.3.1 Separation of procedural requirements from the Model Code

28. Separating procedural requirements from the standards of conduct seems rational. Hopefully most officers will only need to have regard to the standards.

4.3.2 How will complaints be made?

29. Subject to the comments noted above the proposed procedures for the making of complaints are supportable.

4.3.3 Preliminary assessment by the complaints assessor

30. The Greens welcome the proposed changes that will provide a more workable method of winnowing out complaints, especially vexatious complaints, which ought not to proceed through the complaints process.
31. We look forward to reviewing the specific wording of the amended code in due course.



4.3.4 Referral of a matter to a conduct reviewer

32. Given the greater independence of regional conduct reviewers there is scope to consider allowing the review to be done by a sole reviewer. However no conduct reviewer should be allowed to be appointed, or entitled to accept an appointment, where they have had, or have, a contractual relationship with the Council in question. As noted above the concern as to actual and apprehended bias should unambiguously preclude this from occurring.

4.3.5 Conduct reviewer's preliminary assessment of a matter

33. The ability for a conduct reviewer to do one or more of the options identified is supported. The capacity to refer a matter back to the GM or Mayor for resolution is problematic. These are matters that have been taken through the claims assessor process and as such the capacity to refer them back to the Council should be limited to cases where fresh material has been provided that lead the conduct reviewer to consider the matter less serious in nature. Equally the referral of the matter must not provide the GM or Mayor with the same disciplinary powers as the conduct reviewer.

4.3.6 Investigations by conduct reviewers

34. More prescriptive procedural rules for investigations are welcome.
35. One aspect of the rules that is not supported is the limited ability of a person the subject of a complaint to receive the full complaint, including supporting material, made against them. The rules should state that prima facie a person the subject of a complaint is entitled to receive all the material lodged in support of the complaint, unless there are compelling reasons not to disclose them.
36. The test proposed in the paper, that a conduct reviewer will only be "obliged to provide such information that the conduct reviewer considers reasonably necessary for the subject person to identify the substance of the allegations" inappropriately restricts the right of a person to the material necessary to defend a claim.
37. Any such provisions should of course be subject to any contrary statutory provisions such as the *Public Interest Disclosures Act 1994* and the Greens would recommend that the advice of the Ombudsman be obtained as to the final drafting of these provisions.
38. In order to ensure that parties to a complaint have a genuine right to personally address the conduct reviewer the Code should make clear that any meeting is to take place at a venue either mutually agreed, or in the event agreement is not able to be obtained, at the relevant Council's chambers.



39. There is some potential lack of clarity between an "investigation" (which requires a threshold to be met before being undertaken) and the process adopted by a conduct reviewer when they "undertake any such enquiries that may be reasonably necessary to establish the facts of the matter." This should be clarified in any final document.

4.3.7 Referral or resolution of a matter after the commencement of an investigation

40. While it is potentially appropriate to allow a matter to remain as a "live" complaint with a conduct reviewer while a referral is underway. Two things must be clear:
- a. That while the third party process is underway the code of conduct complaint is suspended. Otherwise the person the subject of the complaint will potentially be in the impossible situation of responding to two parallel processes; and
 - b. That there is a clear deadline by which either the third party resolution has concluded, or substantially commenced such that the code of conduct complaint is then terminated. If this does not happen then, as with the current scheme, there will potentially be lengthy and unsettling delays in the process, with aggrieved complainants "stringing out" third party processes to keep the code of conduct complaint alive.

4.3.8 Conduct reviewers' reports

41. The Greens support greater clarity in the content of a conduct reviewer's report and also the additional power to recommend that the subject person be required to undertake training or other education relevant to the conduct giving rise to the breach.

4.3.9 Consideration of conduct reviewers' reports by councils

42. The process under which a Council considers a report is crucial to ensuring fairness in the process. It is not clear from the paper if councillors who are the complainant (as opposed to the subject of a complaint) are entitled to be present at a meeting when a report is considered. Clearly they should not.
43. Equally where a Councillor is the subject of a complaint they should not participate in the decision making. However in both cases the rules should make it clear that they are entitled to be heard at the meeting and make written submissions.

4.3.10 Reporting on complaints statistics

44. Reporting on statistics is supported. The Code should provide that the Division of Local Government publish all statistics annually on the internet.



4.3.11 Provisions to excuse procedural defects

45. The Greens acknowledge the need to allow for some flexibility and do not wish to see unmeritorious appeals being commenced based on errors that are of an insignificant or merely technical nature. We look forward to reviewing the specific wording of the amended code in due course.

4.4 Measures to ensure the integrity of Code of Conduct processes

4.4.1 The role of the Division of Local Government

46. If this new scheme is to be workable, it will require strong oversight by the DLG and the proposed internal "Chinese walls" within the Division should allow this to occur.

4.4.2 Rights of review

47. The ad hoc, and unsatisfactory, nature of reviews by the DLG of complaints under the present code is evidence of the need for a formal review process. We therefore welcome greater clarity in this as review process as proposed and look forward to reviewing the specific wording of the amended code in due course.

4.4.3 Practice Rulings and Practice Directions

48. Practice Rulings and Directions may have some utility. Equally there may be merit in refining the Code of Conduct as specific issues arise.

4.4.4 Disclosure of the identity of complainants

49. The provisions regarding disclosure of a complainant's identity are generally supported. We look forward to reviewing the specific wording of the amended Code in due course.

4.4.5 Provisions to prevent the misuse of the Code

50. There is no doubt that there have been many instances where persons have used complaints under the code of conduct to run essentially political campaigns against their opponents on a Council. Changes to the Code that limit the capacity of this to continue are welcomed.
51. In regards the obligation of a person to comply with a "*reasonable and lawful request of a person exercising a function under the Code without reasonable excuse*" the code should make clear that "*reasonable excuse*" includes the right to claim legal professional privilege as well as the right to silence.



52. Any limits on public disclosure of a code of conduct complaint cannot apply once a matter has been considered by Council. Otherwise it will not allow a person who has potentially been the subject of an adverse finding to present their own defence to the public. This is inherently anti-democratic and, if allowed, would effectively gag persons the subject of adverse comment or findings. This is not usual practice.

4.5 Proposed amendments to the misbehaviour provisions

53. Any amendments to the Act will be considered in due course. In considering any amendments allowing for greater opportunities for the Department to take disciplinary action against a Councillor it must be remembered that a Councillor is a publicly elected official and should not be, ordinarily, subject to dismissal by an unelected bureaucrat.
54. It is of particular concern that the Department is seeking amendments to section 440I so that disciplinary action could be taken against a councillor simply on the grounds that the councillor's behaviour has involved one or more incidents of misbehaviour. This expanded power must be limited to cases where the misbehaviour is serious and the incidents of a similar or substantially similar nature.
55. Further the proposed powers of the Director General who, having considered a departmental report determines to take disciplinary action against a person are on one view excessive and have the potential to cause oppression and unjust outcomes. Of particular concern are the powers to:
- Require the councillor to reimburse a sum of money specified in the order to a person or organisation specified in the order; and
 - Require the councillor to take such other action specified in the order;
56. These powers are not limited as to scope or to the quantum of compensation payable. They are not powers that sit well with an administrative decision making process as proposed under the amendments.

4.5.2 Disciplinary action by the Tribunal

57. These increased powers may be appropriate. It does however appear contrary to the intention of the review of the model Code, namely to improve and enhance the practices and procedures under the Code, to allow for a matter to be referred to the Tribunal by the Director General, without first accessing the improved code of conduct process. If such a provision was included in the Act then it would be necessary to include clarification that such referral to the tribunal terminated any process under the Code of Conduct in relation to the same matter.
58. Any further specific amendments to the Act will be considered in due course.



Conclusion

59. Thank you for the opportunity to comment on the Position Paper. Should you wish to discuss any of the above in more detail please do not hesitate to contact Mr David Shoebridge on (02) 9230 3030 or david.shoebridge@parliament.nsw.gov.au.

David Shoebridge MLC
The Greens NSW
Local Government spokesperson

Senator Lee Rhiannon
Australian Greens
Local Government spokesperson