

Department of Planning and Environment

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Review of the Councillor Misconduct Framework

Consultation Guide on the recommendations of the Kellar Report and potential changes to the NSW councillor misconduct framework

December 2022





Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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1 Executive Summary

The people of NSW rightly expect their elected officials to uphold the highest standards of integrity and leadership.

The majority of councillors do the right thing, but those that breach the trust of their communities should face the consequences.

It is clear, following feedback from the local government sector and recent Independent Commission Against Corruption and other public inquiries into local government, that the framework governing councillor misconduct needs to be reformed to meet contemporary community standards.

In 2021, the NSW Government commissioned an independent review of the processes and procedures for dealing with allegations of councillor misconduct.

Mr Gary Kellar PSM was appointed to undertake the independent review, having served as a member of the expert panel which conducted a review of the local government misconduct framework in Queensland in 2017.

Mr Kellar also has extensive experience in the local government sector, including 26 years as General Manager of Logan City Council.

Mr Kellar's report, *Focus on Civic Responsibility: Councillor Conduct Accountability in New South Wales*, was delivered to the Minister for Local Government, The Hon. Wendy Tuckerman MP, in October 2022 and is available on the Office of Local Government website.

The review examined the current administrative framework under which complaints about councillor misconduct are managed, including analysis of other jurisdictions.

The Kellar report makes 49 recommendations, which are summarised in this consultation guide.

While extensive consultation has already occurred, the NSW Government is inviting further feedback and submissions on some of the key recommendations for change contained in the report.

The recommendations for change are extensive and include: a new, independent framework for dealing with councillor misconduct; the establishment of an independent Councillor Conduct Commission to oversee independent Councillor Conduct Review Panels, and tougher, prescribed penalties and sanctions to respond to misconduct, including the ability to impose monetary penalties on individuals.

Those councils who experience misconduct and the NSW Government would be jointly required to meet the costs of the independent panels and the Commission in dealing with complaints about councillors.

Other key recommendations include:

- requiring candidates at local government elections to participate in free training before they can nominate for local government elections;
- prescribing mandatory training and professional development requirements for elected councillors;

- creating and mandating a separate code of conduct for councillors, covering all forms of meetings, briefings and workshops; and
- revising the Model Code of Meeting Practice and strengthening the mayor's/chair's powers and obligations.

The full list of recommendations are provided in this document.

Priority considerations are outlined in the Executive Summary below to guide your consideration and feedback.

The NSW Government has made no final decisions about the Kellar report's recommendations at this time and seeks feedback from the local government sector and the public to inform the Government response to the review.

2 Priority considerations

The review examined the NSW Misconduct Framework in depth and presents a compelling case for change.

It is clear that the current councillor accountability framework needs to be strengthened and improved, as it is not effective in deterring or addressing councillor misconduct in NSW.

This Consultation Guide seeks feedback on the Kellar report, in particular, recommendations for significant changes to the management of councillor misconduct in NSW and the establishment of an independent Councillor Conduct Commissioner and conduct review panels as follows:

1. The introduction of independent oversight by a Councillor Conduct Commissioner.
2. The establishment of independent conduct review panels (mirrored on the regional planning panels), operating under the independent oversight of the independent Councillor Conduct Commissioner.
3. Cost recovery for the operational costs of the Commission and the independent panels from councils using the service.
4. Cost recovery from councillors found to have committed repeated misconduct or integrity breaches or behaving in a way that unnecessary prolongs an investigation.

Who may make submissions?

Anyone is welcome to offer comment through formal written submissions.

This includes councils, individual councillors and council staff, unions, professional associations and the general public.

How do I make a submission?

Detailed instructions for how and where to make a submission are provided on page 25.

Each section of this Consultation Guide contains ‘feedback considerations’ which are prompts for reflection to help in developing a response.

You do not need to answer the questions directly (or at all) – they are included to assist in eliciting relevant, focused and meaningful feedback for anyone who may find them helpful.

Closing date for submissions

Submissions should be made before **5pm on 3 February 2023**.

Terminology

References to councils in this paper are to be taken as a reference to general purpose councils, county councils and joint organisations.

The term “misconduct” carries a specific technical meaning under the Act and includes among other things:

a breach by a councillor of the Act or regulations,

a failure by a councillor to comply with their council’s code of conduct,

an act of disorder by a councillor at a meeting and any act or omission intended by a councillor to prevent the proper or effective functioning of the council or a committee of the council.

The phrase “councillor misconduct” used in this paper carries this broader meaning and includes breaches by councillors of a council’s code of conduct.

3 Overview of recommendations

A central recommendation of the review is the establishment of a new framework for dealing with councillor misconduct.

Under the new framework, code of conduct complaints about councillors would be managed by newly established independent Councillor Conduct Review Panels.

These panels would fall under the regulatory oversight of an independent Councillor Conduct Commissioner.

Panels would have stronger and prescribed disciplinary powers than those currently available to councils including the ability to impose monetary penalties. Councils would be required to meet the costs of the Commission and the panels in dealing with misconduct complaints about their councillors.

A full list of the 49 recommendations from Mr Kellar’s report is contained below. Mr Kellar’s recommendations are themed under the headings of:

- Legislate
- Educate
- Prevent
- Devolve/Empower
- Detect and Manage
- Discipline
- Direct, Audit and Intervene
- Assure Equity, and
- Implementation

3.1 Legislate

1. That a statement of behavioural standards for councillors be included in the Local Government Act 1993 to provide greater statutory obligation for their observance.
2. That a new code of conduct for councillors be developed fully separate from the employees code and focused on the specific context of elected members.
3. That the new code establish clear alignment with the guiding principles for councils contained in Section 8A of the Local Government Act 1993, the proposed behavioural standards referred to in recommendation I, and with the councillors Oath and Affirmation of Office.
4. That the new code:
 - a. apply to every forum in which councillors participate in their capacity as an elected member of the local government including Regional Planning Panels, Audit Risk and Improvement Committees, Advisory Committees as well as workshops briefing sessions and the like.
 - b. incorporate a schedule of councillor conduct standards and jurisdictional enforcement options (as described in Section 8.1 of Mr Kellar's report), clearly defining the behaviours that represent breaches of the code of conduct according to relevant classes, together with the associated sanctions and penalties applicable to those breaches.
 - c. address any other deficiencies of uncertainty and ambiguity identified elsewhere in this report.
5. That the councillors oath and affirmation of office prescribed in Section 233A of the Local Government Act 1993, be amended to make specific reference to faithful observance of the councillors code of conduct (see Attachment C of Mr Kellar's report).
6. That serious breaches of the code of conduct be treated as breaches of the councillor's oath and affirmation of office.
7. That Section 233A of the Local Government Act be amended to clearly state the consequences of a councillor breaching the oath or affirmation of office.

Feedback considerations:

- How can the behavioural expectations and standards prescribed in the oath/affirmation of office in the Local Government Act 1993 be strengthened to ensure that behavioural standards are clear, in line with contemporary community expectations and enforceable?
- What changes to the oath and affirmation of office would be beneficial?
- Do you support the introduction of prescribed types of misconduct and corresponding enforcement options (penalties and sanctions) shown in the Kellar report (Attachment D)?
- How will this improve consistency in the approach to misconduct and outcomes across NSW councils?

3.2 Educate

8. That mandatory pre-nomination training be introduced for all candidates as a pre-condition of nominating for local government elections and appropriate amendment to the NSW Electoral Act 2017 be sought for this purpose.

9. That the Office of Local Government in consultation with LGNSW and appropriate Sector stakeholders be tasked with developing the pre-nomination training course to be offered online using the Queensland model for guidance.

10. That attendance at councillor induction courses be made mandatory and completion of the required training within three months of election be made a precondition of newly elected councillors whether freshly elected or returning, participating in council meetings.

11. That mandatory supplementary training for mayors be required to include specific training on:

a. conducting meetings and the code of meeting practice, including managing disorderly meeting behaviour.

b. conducting performance reviews involving the council's general manager.

12. That a uniform program for continuing professional development and refresher training for councillors and mayors be developed nominating mandatory content requiring attendance of councillors.

13. That all training content for mandatory councillor training topics be developed in consultation with LGNSW or appropriate Sector stakeholders and be required to be delivered by trainers accredited in those topics.

14. That appropriate sanctions or penalties be imposed for non-attendance by councillors at mandatory councillor training courses.

Feedback considerations:

- Do you support the introduction of pre-nomination training as a pre-condition for candidates standing for local government election?
- What mandatory pre-nomination training would be useful to prepare a candidate for local government office?
- The Local Government (General) Regulation 2021 (the Regulation) currently requires mandatory training and professional development for all councillors and mayors in NSW.
- What mandatory professional training and capability development modules should be included in the training and professional development for councillors and Mayors?
- What is the minimum number of hours per year of mandatory training that councillors and mayors should be required to complete to build and maintain the skills necessary to perform their roles?
- Would sanctions or penalties should be used to ensure compliance with mandatory training and professional development obligations?

3.3 Prevent

15. That all meetings of councillors even if closed to the public for legitimate confidentiality reasons be audio visually recorded for transparency and accountability.

16. That all meetings of councillors including workshops and briefings require written

declarations and recordings of conflicts of interest.

17. That as well as addressing the matters mentioned elsewhere in this report concerning review of the code of conduct, attention be given to addressing the transparency and risk issues (mentioned in Section 5 or Mr Kellar's report).

Feedback considerations:

- How can the transparency of council meetings be enhanced?
- All councils in NSW are required to webcast meetings of the council and committees whose membership comprises only of councillors.
 - Should these meetings be live broadcast to enable real-time participation by communities?
 - In addition to maintaining written records of councillor briefings and workshops, should audio-visual recordings be required to increase transparency and accountability to communities and reduce risks associated with lobbying?
 - Should those recordings be placed on councils' websites (excluding the confidential business components)?
 - What extra measures should be implemented to increase the transparency of decision making and ensure open public access to meetings and proceedings of councils?
- How should existing provisions for the making and recording of declaration of conflicts of interest be strengthened?
- Should all disclosures made at meetings, workshops and briefings be required to be made in writing and placed on an open access register on councils' websites?
- The Model Code of Meeting Practice for Local Councils in NSW currently states that public forums should **not** be held as part of a council or committee meeting. Should this separation be mandated?

3.4 Devolve / Empower

18. That the power of mayors and meeting chairs to manage disorderly meeting conduct be strengthened by including power to order an offending councillor

- a. to cease the act of disorder and desist from repeating that act for the duration of the meeting.
- b. to refrain from participating in discussion or debate on business before the meeting for a specified item or specified time or for the remainder of the meeting, consistent with the current power of the Chair to “mute” a councillor’s audio link at an audio-visual meeting.
- c. to withdraw from the meeting for a specified time or for the remainder of the meeting.

19. That Section 10 of the Local Government Act 1993 be amended to empower the mayor or chair to expel a disorderly councillor without needing to obtain the resolution of the meeting.

20. That the code of conduct include provision for mayors/meeting chairs who fail to deal with disorder or misuse the power to be subject to complaint for serious misconduct.

21. That the code of conduct and code of meeting practice clarify that all councillors attending meetings have an obligation to maintain order and assist the mayor/meeting chair is maintaining order.

22. That provision be made for OLG intervention by way of providing or partnering with LGNSW or other appropriate Sector stakeholders in providing councils with a meeting conduct adviser or meeting moderator where appropriate.

Feedback considerations:

- What changes should be made to strengthen the powers and accountability of mayors and meeting chairs to manage the conduct and behaviour of councillors?
- How can the Act be strengthened to better prevent and manage poor behaviour or disorderly conduct at meetings, briefings, workshops and official functions?
- How should the Model Code of Conduct for Local Councils in NSW and the Model Code of Meeting Practice for Local Councils in NSW be strengthened to incentivise a high standard of behaviour for councillors and disincentivise poor behaviour?
- What early intervention powers should the Councillor Conduct Commissioner be given to prevent and stop problematic behaviours quickly and prevent the escalation of complaints and reduce the subsequent number of formal interventions into councils?
- How could meeting conduct advisors or meeting moderators be empowered to assist in ensuring an appropriate standard of behaviour during meetings.
- How should the cost of the appointment of a meeting conduct adviser or meeting moderator be met, if an appointment is required?

3.5 Detect and Manage

23(A). That the framework for councillor conduct accountability be restructured as follows:

- a. Requiring complainants to submit complaints using a prescribed complaint form supplying all relevant information to assist assessment of the complaint.
- b. Establishing jurisdictions for dealing with councillor conduct complaints as follows:
 - i. Mayors/meeting chairs
 - ii. Independent Councillor Conduct Review Panels
 - iii. Councillor Conduct Commissioner
 - iv. NCAT
 - v. ICAC and other agencies
- c. Adopting of a schedule of councillor conduct and jurisdictional enforcement options to underpin authority of the various jurisdictions involved in the framework.
- d. Removing current powers and functions of council general managers to process and/or determine any matters associated with councillor conduct complaints.
- e. Create powers for the council complaints coordinator to receive and refer correctly lodged complaints concerning councillor conduct to the relevant Independent Councillor Conduct Review Panel (as outlined in Section 7 of Mr Kellar's report).
- f. Removing current powers and functions of councils to determine outcomes associated with councillor conduct complaints.
- g. Creating Independent Councillor Conduct Review Panels for the assessing, investigation and determination of councillor conduct complaints, including making orders for

sanctions and penalties, as outlined in Section 7.6 of Mr Kellar's report.

- h. Assigning of local governments to the jurisdiction of specific panels according to a process to be developed in consultation with appropriate Sector stakeholders.
- i. Recruiting appropriately qualified personnel as chairs and conduct reviewers to panels with panel chairs and members to be appointed by the Minister in consultation with appropriate Sector stakeholders.

23(B). That the Procedures for the Administration of The Model Code of Conduct for Local Councils in NSW 2020 be comprehensively reviewed to align with the proposed new framework for councillor conduct accountability as outlined in this report.

24. That a system of procedural directives for Independent Councillor Conduct Review Panels be prepared by the Commissioner to enable the Minister to manage the operational environment of the Panel system for consistency and responsiveness to sector needs.

25. That the Commissioner be required to maintain a central register of councillor conduct complaints and their management through the proposed framework, including for transparency, publishing appropriate details on the Commissioner's website.

26. That separate uniform investigations practice guidelines be compiled to guide panel investigations into councillor conduct complaints (as outlined in Section 7.11 of Mr Kellar's report).

27. That criteria and procedures be created for the referral of matters from the Councillor Conduct Commissioner to the OLG concerning implications of individual councillor conduct for the effective performance of a council.

28. That a detailed implementation plan for the introduction of the proposed panels be made a priority for the Councillor Conduct Accountability Framework Implementation Task Force (referred to in Section 11 of Mr Kellar's report).

29. That the integrity of the Independent Councillor Conduct Review Panels jurisdiction be

assured by according appeal rights to aggrieved parties only on the basis of denial of natural justice and through the usually available recourse to NCAT, with complaints about panel procedural performance being referred to the Commissioner for consideration.

Feedback considerations:

- Do you support the introduction of an independent Councillor Conduct Commission and conduct panels to assess, investigate and determine code of conduct complaints referred by councils?
- How could the introduction of the independent councillor conduct review panels (oversighted by the independent Councillor Conduct Commissioner) be implemented?
- Do you agree with the introduction of regionally based independent conduct review panels?
- Are there any challenges for rural and remote councils? How could these be overcome?
- Which stakeholders should be consulted prior to determining how the panels could work and their composition?
- How should the jurisdiction and composition of each conduct review panel (the groupings of councils) be determined (e.g. by volume, location or other factors)?
- How can the investigations process be strengthened to ensure quality and consistency?
- Do you support the creation of mandatory investigation practice guidelines to provide consistency in the approach and quality of councillor misconduct investigations?

3.6 Discipline

30. That the proposed Independent Councillor Conduct Review Panels be provided with guidance as to the range and extent of penalties to be ordered within their jurisdiction, including guidance as to the determination of penalties for repeat offenders. The adoption of a schedule of Councillor Conduct and Jurisdictional Enforcement Options should be considered. (see attachment D in Mr Kellar's report).

31. That more rigorous application of available penalties be adopted commensurate with the seriousness of conduct offences to act as deterrent to misconduct.

32. That the maximum period of suspension from meeting attendance or from official duties be increased for more serious or repeated conduct breaches.

33. That in addition to existing penalties, monetary penalties be introduced for certain integrity breaches such as failure to register or declare pecuniary or substantial conflict of interest.

34. That partial or full cost recovery from councillors be introduced where they are found to have committed repeated misconduct or integrity breaches or have contributed to unnecessary prolongation of the investigation.

Feedback considerations:

- Are the penalties and sanctions proposed in the review report (Attachment D) appropriate to deter poor behaviour and improve councillor conduct?
- Do you support the introduction of monetary and/or other penalties for certain integrity breaches such as failure to register or declare a pecuniary or significant conflict of interest?
- Do you agree that there should be partial or full cost recovery from councillors where they have been found to have committed repeated misconduct or integrity breaches or contributed to the unnecessary prolongation of an investigation (e.g. direct reimbursement by the councillor, suspension of councillor allowance, monetary penalties or fines)?

3.7 Direct, Audit and Intervene

35. That appropriate protocols for the interface of the Councillor Conduct Commissioner and OLG be developed to ensure close cooperation in the implementation of the proposed new framework.

36. That urgent consideration be given to providing OLG and consequently the Commissioner and proposed Independent Councillor Conduct Review Panels with an effective automated case management and knowledge management system.

37. That the councillor conduct accountability framework be underpinned by greater data gathering and analysis of sector experiences to provide accurate reporting of conduct review outcomes and to inform ongoing initiatives for both preventative and responsive action on conduct issues.

38. That the councillor conduct reporting period be realigned to financial years to enable gathering of financial data concerning the cost of conduct reviews and improved management of

the overall framework in terms of budget performance.

39. That the arrangements for accreditation of councillor training programs and ongoing education of councillors be further defined and resourced, with options for partnerships between the Commissioner and appropriate Sector stakeholders in the design and delivery of courses being explored.

40. That the proposed Councillor Conduct Commissioner develop criteria and processes for the recruitment and appointment of Independent Councillor Conduct Review Panel chairs and panel members (as outlined in Section 7.4 of Mr Kellar's report).

41. That the proposed Councillor Conduct Commissioner consider an initiative to join with similar agencies in other states and the Northern Territory to establish an annual forum of discussion on the topic of councillor conduct accountability for the purposes of knowledge sharing and cooperation.

Feedback considerations:

- What are the benefits of divesting the OLG from managing day-to-day individual councillor conduct complaints in order to focus on supporting council performance and sector oversight?
- How should the OLG interface with the Conduct Commission and conduct review panels?
- How should data collection and reporting be improved to support councils to report on their performance and achieve best practice?
- What additional support and resources would assist local councils to improve performance and governance of their communities?

3.8 Assure Equity

42. That the jurisdiction of Independent Councillor Conduct Review Panels be established to deal with councillor conduct complaints and that avenues for appeal against panel decisions be confined to matters of denial of natural justice

for submission to NCAT. Other issues questioning the procedural adequacy of a panel's determination should be referred by complaint to the Commissioner.

Feedback considerations:

- Do you support the process for procedural fairness outlined in the review report?
- Should a Code of Conduct for Independent Councillor Conduct Review Panels be developed?

3.9 Implementation

43. That the cost of the Commissioner's and Independent Councillor Conduct Review Panels' role in the councillor conduct review accountability framework be recovered as far as possible on a fee for service basis from the local governments using the service.

44. That remuneration of Independent Councillor Conduct Review Panel chairs/conduct reviewers and charge out rates be approved by the Minister to provide certainty of cost structures.

45. That a dedicated councillor conduct accountability task force be established to implement the recommendations of this Review.

46. That the composition of the task force comprise the Councillor Conduct Commissioner, a

project team and sector reference group (as outlined in Section 11.2 of Mr Kellar's report).

47. That the implementation plan have due regard to achieving early benefits through administrative change, while pursuing necessary legislative change.

48. That in order to minimise any delay in activating the new framework the Minister appoint an Interim Chair to convene the proposed implementation task force and to advise the Minister on the introduction of necessary legislation and procedural arrangements required to establish the Office of the Commissioner and the framework for the Independent Councillors Conduct Review Panels.

Feedback considerations:

- In 2020/21 a total of 384 code of conduct complaints were lodged at an average cost to NSW councils of \$14,796 per complaint, or over \$2 million, excluding OLG costs.
- Do you support the introduction of a framework where the costs of the independent Commissioner and conduct review panels are borne by councils who generate misconduct complaints (fee for service model)?
- Do you support the establishment of set rates for panel members attending meetings and conducting complaint investigations?
- Would a schedule of panel rates, set annually, assist councils in preparing their annual budgets and forecasting expenditure?
- Would the publication of the costs of individual councillor misconduct investigations in councils' annual reports and in a central conduct register improve transparency and councillor accountability to communities?
- Should OLG pursue full cost recovery from councils in instances where formal interventions to correct council performance are necessary as a result of misconduct (e.g.: issuance of a performance improvement order)?

4 Conclusion

The considerations raised in this consultation guide are intended to generate discussion and help members of the community, local government sector and stakeholders formulate a response to Mr Kellar's report.

Most councillors do the right thing, but in recent years it has become clear that some councils have ongoing issues and serious misconduct is increasing in the sector.

Mr Kellar's report sets out to provide greater rigour around the misconduct framework and ensuring that the public can have greater confidence in their elected officials.

We look forward to your comments on the report.

5 Attachment 1

How to make a submission

Submissions may be made in writing by

5pm on 3 February 2023 via

Email: olg@olg.nsw.gov.au

Post: Locked Bag 3015 NOWRA NSW 2541

Submissions should be labelled 'Review of the Councillor Misconduct Framework - Consultation Guide'.

To ensure submissions offer maximum value in assisting this review to identify the issues it needs to consider and address and to identify possible opportunities for improvement, they should be made based on the following guidelines:

Submissions should be framed to offer constructive responses to the considerations identified in the dialogue boxes at conclusion of each section of the Consultation Paper. These are designed to prompt consideration of the key issues that need to be considered and addressed by the NSW government in response to the Kellar report.

While every effort will be made to preserve any confidential information provided in submissions, submissions or extracts from submissions may be made publicly available at the discretion of OLG. If submissions are made public, contact details will be redacted. The name of the person making a submission may be released unless that person has requested to remain anonymous.

Any submissions received are also subject to the Government Information (Public Access) Act 2009.

For more information, please contact OLG's Council Governance Team on (02) 4428 4100 or via email at olg@olg.nsw.gov.au.

