

9 August 2021

Local Government Division
Department of Premier and Cabinet
By email: LGAReview@dpac.tas.gov.au

Dear Sir or Madam

Code of Conduct Framework

Thank you for the opportunity to provide a submission on the Code of Conduct Framework Discussion Paper. This submission has been prepared by the Local Government Association of Tasmania (LGAT) on behalf of the local government sector in collaboration with our Members, all 29 local councils in Tasmania.

LGAT is incorporated under the *Local Government Act 1993* and is the representative body and advocate for local government in Tasmania. Where a council has made a direct submission to this process any omission of specific comments made by that council in this submission should not be viewed as lack of support by the LGAT for that specific issue.

If you have any questions or would like further information, please do not hesitate to contact me at dion.lester@lgat.tas.gov.au or via phone on (03) 6146 3740.

Yours sincerely



Dion Lester
CHIEF EXECUTIVE OFFICER

LGAT Submission: *Local Government Code of Conduct Framework*

In Tasmania, there is a reasonable expectation that elected members will conduct themselves, in council functioning and business, at a high standard. To guide councillors¹, the State Government has developed the Code of Conduct Framework (Code / Framework). The Code of Conduct Framework is based on eight standards of conduct. To be effective, elected members have a clear responsibility to uphold such expectations in the work of their council and across the innumerable interactions that take place continuously amongst local government stakeholders. It is pleasing that the overwhelming majority are conducted with mutual respect and effective outcomes.

Tasmanian councillors on the whole, work hard and demonstrate mutual respect and a genuine desire to meet community needs to the best of their ability. It must be remembered that councillors and community members are human beings who, no matter how much they try, will make occasional mistakes. The Framework should be reserved for matters of a more serious nature pertaining to breaches of governance standards, serious cultural issues, or loss of public confidence in local government.

This is where the Framework is failing us. We have a system that spends unnecessary time and resources on dealing with the trivial, while on the occasions when serious misconduct occurs, the Framework fails to adequately sanction the breaches. It is these shortcomings that are at the core of the local government sector's concerns over both the Framework itself, but also the function of the Code. This is why, at two General Meetings last year (September and December), there were three separate motions supported.

These motions were:

- September 2020 - That LGAT call on the State Government to conduct a full review of the entire Code of Conduct process, including the Code.
- December 2020 - That the LGAT declares it has no confidence in the Local Government Code of Conduct process and calls on the Minister for Local Government to urgently take a more active role in resolving the issues.
- December 2020 - That LGAT call on the State Government to include mandatory conciliation or mediation by an appropriately qualified arbitrator to be funded by the Local Government Division in the first instance of the code of conduct process.

¹ As defined in the *Local Government Act 1993*, including Lord Mayor, Deputy Lord Mayor, mayor, deputy mayor and alderman

These policy positions were extended at a General Meeting held on the 5 August 2021, with the following motion supported:

That LGAT lobby the State Government to broaden the scope of the present review of the Code of Conduct to include investigation of the transfer of Code of Conduct complaints to the jurisdiction of TasCAT, subject to clarification of the cost implications for participants and councils.

Specific feedback on the proposals contained within the Discussion Paper are provided in the table below (see Specific Comments). While many of the proposed reforms are supported, or supported in principle, much of the feedback received from councils relates to what is not in the Discussion Paper. The limited scope of the current review has not addressed the September 2020 motion, and also fails to capture a number of other matters that were raised at the October 2020 forums run by the Local Government Division. These include:

- A general lack of natural justice and procedural fairness to councillors.
- The process is being used as a forum for interpersonal issues, which would be better resolved through informal conflict resolution processes.
- Significant cost and reputational damage to councillors who have been the subject of complaints.
- A feeling that councillors have not been properly heard with Panels making determinations on minimal evidence.
- The need for proportional and practical sanctions.
- Personal and mental health issues arising from the Code of Conduct processes.
- Dissatisfaction with Panel determinations and the impact of these on the ability of a councillor to perform their roles and functions or defend themselves appropriately.
- Interpretation of the Code of Conduct to create an expectation of councillor conduct beyond that stated within the Code of Conduct.
- A lack of clear reasoning within decisions of the Panel to make a determination on whether decisions are justified at law.
- A lack of clear reasoning to support the imposition of a sanction relevant to the nature of the breach.
- The imposition of an obligation on a third-party organisation for training without prior consent of that body, such as was recently imposed on LGAT.

- Applying the Code of Conduct to actions of a councillor when the Panel has not demonstrated that the actions occurred in performing the functions of a councillor.
- Legal representation and appeal rights.
- Freedom of political expression.
- Language and terminology within the Code.
- The “weaponising” of complaints and the fact that the same person can continually make complaints that are received by the Panel.

In many cases, these issues require further consideration and discussion with the sector on the best way forward. Unfortunately, the limited nature of the current review does not enable this.

The Code of Conduct Framework can generate significant financial, reputational and personal costs, even before any sanctions (e.g. training) are considered. More work is required to mitigate these costs while still providing a consistent, effective and enforceable means to address councillor misconduct.

Specific Comments

A summary of the specific feedback relating Code of Conduct Discussion Paper are provided below:

Consideration	Reference Summary	Comments / Concerns
Immediate Policy Response	Initial Assessment Guidelines	Whilst these guidelines are not publicly accessible for review, councils supported complaints being carefully considered at the initial point and there being clear guidance to Panel members on their initial response.
1	Further strengthening and clarifying the grounds for the Panel to dismiss complaints at the initial assessment stage.	Most councils cautiously supported this proposal given that it could provide more tools for them at an early stage to manage inappropriate complaints. However, it was noted that the public interest test must be well defined. This concern is best summarised by the response of a council that did not support this proposal:

Consideration	Reference Summary	Comments / Concerns
		<p><i>“unless there are clear measurable factors which can demonstrate a public interest, this becomes a further subjective discretion to be exercised by the Panel.”</i></p> <p>The process requires greater clarity on what a complaint must satisfy at the first instance. There should be clear guidance on what constitutes frivolous, vexatious or trivial complaints, the evidence of conduct that was undertaken in the councillor performing their functions and a <i>prima facie</i> assessment that the conduct would, if proven, be a breach of a specific provision of the Code.</p> <p>It has also been suggested that any initial public interest test should consider matters such as:</p> <ul style="list-style-type: none"> • Attempts to interfere in council decision making. • Political motivation. • Seriousness vs likely cost to ratepayers.
2	<p>Removing a perceived conflict of interest for the Code of Conduct Panel Chairperson and providing consistency in relation to the initial assessment process.</p>	<p>There was unanimous agreement that there is currently a conflict of interest and potentially a pecuniary interest for the Chairperson. Many councils supported the process outlined.</p> <p>A number suggested that this could be strengthened by removing any perceived conflict of interest in making this determination and deciding whether a Panel needs to be formed by using either an independent legal practitioner, or the</p>

Consideration	Reference Summary	Comments / Concerns
		<p>Registrar/s of the Government's single tribunal – TasCAT.</p> <p>The latter option would provide not only more consistency but also should ensure increased efficiency and cost effectiveness.</p>
3	<p>Wherever practicable, improve confidentiality requirements in relation to the Code of Conduct complaints process.</p>	<p>This proposal was unanimously supported.</p> <p>However, any requirements need to be the same for both respondent and complainant, particularly when the latter is a member of the public. Confidentiality requirements currently work against a councillor who has had a complaint lodged against them by a member of the public.</p> <p>It should be an offence to provide details of a Code of Conduct complaint to the media or via social media, prior to the matter being determined and presented in an open meeting of Council.</p> <p>Consideration needs to be given to broadening the confidentiality requirements to cover the period of time between a complaint being lodged and the outcome being made publicly available. At the moment, a complainant can publicly voice that they have lodged a complaint against a councillor and make assertions about the guilt of the councillor. However, the councillor cannot refute the claims until the complaint is dismissed, or a determination is published. This can be many months after the incident and the reputation of the elected representative can be damaged during this time. This is</p>

Consideration	Reference Summary	Comments / Concerns
		<p>particularly relevant in the case of vexatious claims.</p> <p>In addition, it has been suggested that there should be the ability for the General Manager to inform the respondent specifically, and the Council generally, that a complaint has been lodged and the broad nature of the complaint.</p>
4	Implementation of council dispute resolution policies.	<p>It is considered essential for complainants to have alternative means to resolve conduct related grievances, before submitting a Code of Conduct complaint. In many circumstances, an opportunity to resolve grievances in a less adversarial environment may provide an avenue for a more genuine, lasting and cost-effective resolution and further, improve long-term community relations for councillors.</p> <p>While a dispute resolution policy may not always be appropriate for every grievance, the Code of Conduct process should also consider a failure to attempt to resolve a grievance by using such policies (where appropriate) in the context of identifying vexatious complainants.</p> <p>At the December 2020 LGAT General Meeting, the following was resolved:</p> <p><i>That LGAT call on the State Government to include mandatory conciliation or mediation by an appropriately qualified arbitrator to be funded by the Local Government Division in the first instance of the code of conduct process.</i></p>

Consideration	Reference Summary	Comments / Concerns
		<p>The current proposal does not respond to the sector position. Significant reservations have been raised regarding dispute resolution processes being undertaken at the local level. It is not clear as to what the role and expectation would be for the Mayor and/or the General Manager or specific council officers in the process and whether outcomes would be achievable or realistic. There is no direct authority over the conduct of councillors within councils, and the General Manager and council officers becoming involved could create unintentional conflicts.</p> <p>The Victorian Code of Conduct Framework provides for an internal council dispute resolution process where councils use independent arbiters. At a minimum, consideration should be given to the use of an independent dispute resolution process or specialists.</p>