

Introduction

The Shire of Serpentine Jarrahdale welcomes the opportunity to comment on the draft model Code of Conduct prepared by the Department of Local Government, Sport and Cultural Industries.

Overall, the Shire believes that the model Code of Conduct that strives to improve consistency between local governments and clarity for Councils, Councillors, CEOs and complaints officers is a positive step forward.

However, the Shire has concerns regarding the practical application of the model Code relating to the Code's complaints management process. The Shire suggests that while the intention of the model Code's process to investigate and manage breaches locally has merit, the practical application may lead to contraventions of natural justice and exacerbate rather than prevent relationship breakdown and Council dysfunction.

In October 2018, the Shire introduced a Business Operating Procedure (BOP) to manage complaints received related to the alleged breaches of the Shire's Code of Conduct. The Shire submits that this Procedure provides a sound approach to managing a potentially challenging issue in a manner that is consistent with principles of natural justice.

Under the Shire's approach (see attached), each complaint received may be ultimately resolved by the Chief Executive Officer either through mediation or by acting on the recommendations of an external investigator. The Chief Executive Officer can also remove themselves from decision-making as required. This approach enables complaints to be managed confidentially and independent of Council.

The Shire notes that the Shire's BOP may be permitted to continue under the proposed model code but that it would be inconsistent with other elements of the proposed model code, which recommend that breaches are dealt with through a (public) resolution of Council.

The Shire suggests that instead, the model Code of Conduct should explicitly empower local governments to manage code of conduct breaches in the manner documented by the Shire's BOP.

Part A – Principles

The Shire supports the principles listed in the model code. The principles of the model code are consistent with the provisions of the Shire of Serpentine Jarrahdale Elected Member Code of Conduct adopted by Council in October 2018. Additionally, the Shire supports the extension of the provisions of the Code to candidates and suggests that Part A should also apply to external members of Committees of Council.

While the Shire supports the principles in Part A in the absence of supporting processes or means to identify and remedy breaches of those principles, as would be the case for example, in an employee code of conduct, the Shire has concerns that principles are largely symbolic and tokenistic.

The Shire observes that this has been a frequent criticism of existing Councillor Codes of Conduct and Regulation 3 of the *Local Government (Rules of Conduct) Regulations 2007*.

Without effective mechanisms and the authority to identify and correct breaches of the code by elected officials and candidates, the Shire questions the extent that the adoption of the model code will contribute to improved representation for the community and stronger governance.

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Part B – Behaviour

The Shire supports the elements of Part B of the model Code of Conduct, but it has reservations regarding the recommended complaints management process.

Under the proposed process listed under the heading of ‘findings’, section 2.23 of the Model code, Council may, by resolution, make a finding of breach or no breach. In practice, a resolution by Council would require an agenda item recommending a code of conduct finding being prepared and presented for Council’s consideration at an ordinary or special meeting of Council. The recommendations of the agenda item would be debated in public with Council determining an outcome via public vote on a resolution in accordance with the *Local Government Act 1995*.

A resolution by Council at a public meeting would be the only means for Council to legally make a resolution in accordance with the Act. The current provisions of section 5.23 of the Act, which deal with matters that can be dealt with behind closed doors, would likely not permit Council to close the meeting.

This approach presents several concerns:

- all members of Council could reasonably be deemed to have an impartiality interest in the determination of code of conduct findings of a fellow member of Council;
- the potential conflict of interest could reasonably be viewed as inconsistent with impartiality and natural justice;
- the matters raised in a code of conduct complaint may be linked to conflicts between Councillors or blocs of Councillors which can further escalate rather than remedy conflict;
- Council has no legal authority to enforce a sanction imposed other than refer the matter to the Standards Panel which could increase exponentially the Standards Panel’s work; and
- the Presiding Member could have a casting vote on a resolution even if the complaint was related to their conduct.

Council’s public debate of a Code of Conduct matter would be in direct contrast to the provisions of the newly amended Act, which in section 5.123, made it an offence to disclose information regarding a Rules of Conduct breach. This would have the effect of making the adjudication of a Code of Conduct breach a public matter whereas a Rules of Conduct breach would be adjudicated confidentially.

In the Shire’s view, this would be inconsistent with the direction of the new Act. The Shire suggests instead that as is the case now in the Shire’s BOP, that all complaints regarding conduct be dealt with confidentially.

The Shire further notes that while the preface states that the model code would apply to council members, committee members and candidates, that Part B of the code would not apply to committee members and candidates. This Shire recommends that this omission be corrected.

While the Shire appreciates the intent of an escalation point to the Standards Panel, it has reservations regarding the approach of third breach being referred to the Standards Panel as a Rules of Conduct breach. As noted above, the Act currently distinguishes between rules and code of conduct breaches with distinct processes and requirements. Providing a pathway for Code of Conduct breaches to become Rules of Conduct breaches runs counter to the long-standing philosophical approach established by the Act. The Shire questions that if Codes of Conduct breaches could become Rules of Conduct breaches, perhaps all Codes of Conduct breaches should be treated as Rules of Conduct breaches referred to the Standards Panel.



Part C– Rules of Conduct

The Shire welcomes publication of the elements of Rules of Conduct, which provide greater clarity on the decision-making basis of the Standards Panel, but has reservations that the inclusion of the Rules of Conduct provisions in Code may confuse and conflate the separation in process and form that investigations into breaches take.