

## Draft Mandatory Code of Conduct for Elected Members: What you need to know!

On Tuesday the Local Government Minister, the Hon Russell Wortley MLC, announced in Parliament the release of the long awaited *Draft Mandatory Code of Conduct for Council Members*. The draft Code, which is prescriptive in its content, is available for consultation until 21 December 2012. Consultation responses may be made to the Office for State/Local Government Relations and/or the Local Government Association.

The ability to introduce a prescriptive code in this manner is made possible by the proposed new section 63 of the *Local Government Act 1999* as set out in the *Independent Commissioner Against Corruption Bill 2012*. The *ICAC Bill* also contains other proposed amendments to the *Local Government Act* which will facilitate the investigation by the Ombudsman of alleged breaches of certain elements of the draft Code. These amendments include punitive recommendations and action where the Ombudsman finds a breach has occurred. For further information about these issues we refer you to our ICAC Paper 4 at: <http://www.kellyjones.com.au/publications.html>

The draft Code is divided into three parts, as follows: Part 1 - Principles (being the articulation of higher principles of good governance), Part 2 - Behavioural Code (being the behaviours necessary to meet the higher principles of good governance) and Part 3 - Misconduct (being behaviour which meets the first part of the definition of *misconduct in public administration* as defined in the *ICAC Bill*).

The Behavioural Code mandates compliance and, accordingly, is enforceable.

### Part 1 – Higher Principles

Part 1 higher principles of good governance reinforce existing statutory provisions such as discharging duties conscientiously and to the best of the member's ability. They also reinforce other appropriate standards of good governance such as constructive behaviours to foster community confidence and trust.

These principles are not enforceable.

### Part 2 – Behavioural Code

Part 2 deals with behavioural requirements which are aspirational in nature to support the Higher Principles. Accordingly, this Part of the draft Code is intended to manage conduct which falls short of reasonable community expectations but which does not go so far as to amount to Misconduct.

The Behavioural Code mandates compliance and, accordingly, is enforceable. Any person can make a complaint of a breach of this Part. The process for handling complaints is an internal one that must be

determined by individual Councils (ie. an adopted process) as is the resolution of any complaint. The adopted process must then be reviewed within 12 months of each general election.

### Part 3 – Misconduct

Part 3 deals with Misconduct as defined in the *ICAC Bill* which, in summary, captures both contravention of this Part of the draft Code but the *ICAC Bill* also extends to other misconduct whilst acting as a public officer.

Every member is required to report any reasonable suspicion of Misconduct by another member.

This Part also mandates compliance but is enforceable through external processes – breaches of this Part are referred to the Ombudsman.

### Issues arising for consideration

From our first reading and consideration of the draft Code the following are relevant issues both for your understanding and as part of your considerations if you take up the opportunity to respond as part of the consultation process:

- The Part 2 behaviours variously reinforce and reflect existing legislative provisions (e.g. not directing Council staff) and many of the standards and requirements of current Codes of Conduct (e.g. personal comment to the media clearly indicating it is the expiration of private views). However, a significant proposal of the draft Code is that elected members comply with all Council policies and requests for information or work or actions must only be made to the CEO or nominated delegate(s).
- Every member is placed under a duty to report any reasonable suspicion of Misconduct by another Member. A failure to make such a report is a breach of Part 2.
- Whilst the draft Code is prescriptive in its application, there is flexibility as to how each Council chooses to address complaints made under Part 2 of the Code.
- Any member who fails to:
  - co-operate with a Part 2 investigation; or
  - comply with a resolution of the Council after a finding of a breach of Part 2

may be referred (to the Ombudsman) for investigation for Misconduct.

- Continued breaches of Part 2 by the same member also constitute grounds for referral for investigation for Misconduct.
- The draft Code provides an exhaustive list of sanctions for a breach of Part 2. This means that a Council is not able to develop its own supplementary sanctions. The available sanctions include two that the Council may determine of its own initiative, being a censure of the member or the removal of the

member from a position that the Council has appointed to. For this latter sanction, Councils must take care to ensure that there is no breach of the principles of procedural fairness in effecting the removal. The balance of the sanctions are stipulated as being in the nature of a request to the member concerned to take particular action – however, a failure to comply with a request might result in a referral for Misconduct (see above).

- Any allegation of a breach of Part 2 is to be made to the Principal Member or the CEO (or delegate) of the Council. Any allegation of a breach of Part 3 is to be made to the Council, the Ombudsman or the Office for Public Integrity (OPI) – however, the Code states that such allegations will be referred to the Ombudsman for investigation. An alleged breach of the Code cannot, therefore, be reported directly to the ICAC.

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- Under the *ICAC Bill* when a complaint is made to the OPI it must be assessed, amongst other things, as to whether it raises a potential issue of Misconduct. Where it does, the OPI may refer it to the Ombudsman or to the Council (see clause 22(2) of the *ICAC Bill* – this statutory provision will prevail over the draft Code which suggests all alleged breaches for Misconduct will be referred only to the Ombudsman).
- Relevant to Part 3 of the draft Code it is proposed that a new section 263B of the Local Government Act 1999 (to be inserted by the *ICAC Bill*) will provide that where the Ombudsman completes an investigation he may recommend that the member be reprimanded, attend a specified course of training, issue an apology in a particular form or take other steps, reimburse the Council or that a complaint be lodged against the member in the District Court. Where a Council adopts and imposes any such recommendation from the Ombudsman and the member fails to comply, the *ICAC Bill* provides that the Council is to ensure that a complaint is lodged against the member in the District Court.
- In relation to the longstanding dilemma about the receipt and recording of gifts and benefits for the holders of public office, it is important to note that Part 3 of the draft Code provides that a member must **not** accept **any** gift, advantage or promise from any person who is in or who seeks to be in any contractual/special relationship with the Council. The draft Code gives examples such as hospitality, entertainment and travel. The draft Code also provides that this limitation applies in respect of the discharge of duties of office of the member – in our view, it would be extremely difficult for any member to prove the negative, that the conferral of a gift, advantage or promise had no relationship to the discharge of the duties of office.
- Part 3 of the draft Code also requires a member who has received a gift, benefit or advantage, with a

monetary or retail value of or above an amount to be prescribed by the Minister, declare that fact to the CEO so that it may be recorded in a register of gifts. In our view, given the prohibition upon the acceptance of a gift, advantage or promise set out above, this provision is only relevant where the gift, benefit or advantage is accepted from a person who is not within the class of persons described above (i.e. not in or seeking to be in a contractual or special relationship). The draft Code at this point vacillates between 'gift, advantage or promise' and 'gift, benefit or advantage'. Also, whilst it is not stated in the draft Code, it is assumed that the register of gifts will be a public document consistent with the Higher Principles which reinforce open, responsive and accountable government.

- Currently, it is recommended (i.e. it is not mandatory) that elected members update their register of interest returns from time to time. Part 3 of the draft Code proposes to alter the current position to place a positive obligation on members to ensure the accuracy of their return at all times and any amendments to the returns occur as soon as practicable. Importantly, a failure to comply with this obligation under Part 3 will constitute Misconduct.
- Members must also take careful note that Part 3 of the draft Code, in addition to reinforcing the need to comply with the conflict of interest provisions, introduces for the first time in an expressed mandatory form, that members must make decisions without any bias (actual or perceived in our view) and in the best interests of the whole community. This is an important development for elected members in their decision making responsibilities because it is contained within Part 3 of the draft Code where failure to comply constitutes Misconduct.
- Clauses 3.17 and 3.18 of the draft Code which call up Part 2 appear to be unnecessary in light of the provisions of 2.23 and 2.24 of the draft Code.

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As South Australia's leading legal advisors to Councils in matters of governance we would be pleased to elaborate upon any of the above or to assist you with any submission you wish to make. In the meantime, please accept this **LG Alert** as one of our added value services to our local government clients.

If you have any questions please contact Michael Kelledy or Natasha Jones on 0417 653 417, 0419 864 531 or [mkelledy@kelledyjones.com.au](mailto:mkelledy@kelledyjones.com.au), [njones@kelledyjones.com.au](mailto:njones@kelledyjones.com.au)