

Review of the Local Government Code of Conduct

Tasmanian Government Response

June 2018

1. Background to the Review

Tasmanians need to be confident that the councillors they elect to represent them will uphold and abide by certain standards of conduct and behaviour. The local government Code of Conduct framework plays an important role in supporting this outcome.

A statewide Code of Conduct framework applying to all elected councillors first commenced on 13 April 2016. The framework was established through changes to the *Local Government Act 1993* (the Act) and replaced a patchwork of previous code of conduct arrangements that were in place at the individual council level.

The framework was developed through extensive consultation with the local government sector and the Integrity Commission, and provides for greater uniformity and enforceability than pre-2016 arrangements, which were widely seen as lacking consistency and credibility.

In early 2017, the Tasmanian Government agreed to a request by the sector for a review of the local government Code of Conduct framework (the Review) at the conclusion of its initial 12 months of operation. The aim of the Review was to investigate whether the framework is proving to be effective, and identify and address any aspects of the framework that have not operated as intended.

The Review, which is now complete, was the subject of substantial consultation. The Local Government Association of Tasmania (LGAT) led consultation with councils, while the Department of Premier and Cabinet's Local Government Division (LGD) led consultation with Code of Conduct Panel members and the Executive Officer. The sector endorsed a set of recommendations at the LGAT General Meeting on 1 November 2017.

2. The Tasmanian Government's Response

Appendix A outlines in detail the Government's response to the proposed changes put forward through consultation with both the sector and Panel members. The Government has considered and responded to all proposed changes with reference to the following four guiding principles:

- 1) **The Code of Conduct is designed to establish best practice for councillors in discharging their functions and obligations as elected officials, predominantly focussing on behavioural expectations and complementing the legal requirements of the Act.** Serious matters of misconduct (e.g. misuse of office) are separately (and appropriately) dealt with as offences under the Act. Where there are overlaps between the code and the Act, streamlining of the code to remove duplication is supported.
- 2) **Proceeding to the formal complaints process should be the last – not first – resort for resolving behavioral matters.** Measures that reduce the number of vague, frivolous, trivial or vexatious complaints at the earliest opportunity should be pursued as a priority, as should placing the onus on parties to resolve issues before resorting to the formal complaints process. The amount of time and resources in dealing with trivial complaints should be reduced to the maximum extent that is reasonably possible without compromising the rigor of the complaints process.

- 3) **The code of conduct process is not intended to operate as a ‘court’.** Concepts such as the awarding of costs against parties to a complaint, and mandating the right for parties to be given a hearing in relation to a complaint are not appropriate given the objectives and nature of the code of conduct framework.
- 4) **High levels of prescriptiveness should be avoided where possible, particularly where they have the potential to prevent or constrain the exercise of professional judgement in arriving at a sensible, fair and efficient outcome.** Code of Conduct Panels should be given sufficient flexibility to exercise their professional judgement with respect to dealing with complaints, including in relation to whether or not they need to hold a hearing, or whether or not they accept amended complaints. It is acknowledged that Panels must have the requisite skills, and receive sufficient support and training, so as to ensure the sector can be confident that Panel members are well equipped to exercise the necessary level of judgement on such matters.

The Government broadly supports adjusting and refining the code to address the issues and concerns identified by the sector and Panel members during consultation.

The Government notes the sector’s position is that the Government should have overall administrative and funding responsibility for the Code of Conduct framework. However, it is common practice across a number of sectors for a regulated entity to fund certain costs associated with its own (independent) regulation. The Government will engage the sector in a broader discussion about governance and funding in parallel with work to implement other recommendations.

3. Reform Package

The Government is proposing a package of 19 individual improvements to the Code of Conduct framework, which will include legislative amendments, changes to the Model Code and administrative and process improvements.

The changes are designed to increase the sector’s ownership of, and commitment to, the framework and improve the efficiency of complaints processes, including through the early dismissal of trivial complaints.

Key elements of the Government’s response include:

- **A new requirement on the parties to a complaint to demonstrate that they have undertaken ‘reasonable efforts’ to resolve an issue that is the subject of a complaint before a complaint is formally accepted.** This will place the onus on parties to try and resolve an issue as before formal escalation, and reinforce that a code of conduct complaint is an option of last, not first, resort in relation to elected member behavior.
- **A new provision in the model code to allow Panel Chairs to dismiss complaints on the basis of ‘triviality’, as well as frivolous and vexatious complaints.** Adding ‘trivial’ will support a reduction in the number of complaints to only those that are material in nature.
- **The removal of duplicative provisions, such as ‘pecuniary interests’ and ‘misuse of information’ from the Model Code.** These changes will support the Code’s focus on

behavioural matters by eliminating unnecessary duplication between issues that are specifically dealt with by the Code and those that are already covered by other offence provisions of the Act.

- **A new provision to explicitly prevent all relevant parties from misusing information they obtain as part of a code of conduct investigation.** The Act does not currently deal with the misuse of information obtained by Panel members or complainants, only elected members. Misuse of information provisions should apply to all parties involved in the complaint process.

The Government's full Code of Conduct reform package is summarised in **Table I**, below.

Table I: Code of Conduct Review Reform Package

Legislative Changes (<i>Local Government Act 1993</i>)		
#	Change	Rationale
1	A new legislative provision will allow Panel Chairs to dismiss complaints on the basis of 'triviality', as well as frivolous and vexatious complaints.	The amount of time and resources in dealing with obviously trivial complaints should be reduced to the maximum extent that is reasonably possible without compromising the rigor of the complaints process. Panel member and sector advice is that 'frivolous and vexatious' is too narrow to allow the dismissal of 'trivial' matters. Adding 'trivial' will support a reduction in the number of complaints to only those that are material in nature.
2	The complainant and respondent will both be required under the Act to make a Statutory Declaration in relation to a complaint.	It is a reasonable expectation that both parties should be willing to attest – 'under oath' - to the honesty and accuracy of their accounts. This change was suggested by both the sector and Panel members.
3	Complainants will be required to demonstrate that they have undertaken 'reasonable efforts' to resolve an issue that is the subject of a complaint before a complaint is formally accepted. The Chair of the Panel will be given flexibility to judge what is reasonable in the circumstances on a case-by-case basis.	This will place the onus on parties to try and resolve an issue before formal escalation, and reinforce that a Code of Conduct complaint is an option of last, not first, resort in relation to elected member behavior.
4	The ability for a complainant to amend a complaint once the Panel has commenced an investigation will be removed.	The Chair will retain the flexibility and discretion to make a decision about accepting an amended complaint, on a case-by-case basis up until the beginning of an investigation. However, post the commencement of an investigation, additional complaints will need to be submitted separately and assessed on their own merits.

5	A new provision will be included to prescribe that Determination Reports must be kept confidential until they are formally tabled by the relevant council.	This change will enhance procedural fairness and confidentiality.
6	Councils will not be permitted to table a complaint determination reports in an open council meeting while a determination is still subject to appeal.	This change will enhance procedural fairness.
7	Councils will be required, in their Annual Reports, to report on the total number of complaints they received in a given financial year.	This change will increase transparency of reporting on complaints, which already requires councils to report on the number of complaints upheld and the costs associated with complaints met by councils.
8	All parties will be explicitly prevented under the Act from misusing information they obtain, or are privy to, as part of a code of conduct investigation.	The Act does not currently deal with the misuse of information obtained by Panel members or complainants, only elected members. Misuse of information provisions should apply to all parties involved in the complaint process.
9	Councils will be required to place determination reports on the agenda of open council meetings.	While 'tabling' is already provided for under the Act, this does not always result in the matter being placed on the meeting agenda. This change will increase public transparency.
10	Responsibility for councillor training costs resulting from a code of conduct determination should be clarified.	Training costs should to be borne by the relevant council, not the individual councillor, and this should be reflected in the Act.

Changes to Model Code

#	Change	Rationale
1	Potential changes to the 'materiality test' in Part 2 (6) of the Model Code that currently applies with respect to conflicts of interest will be subject to further review and consultation with the sector.	<p>The Model Code currently provides that elected members are to "...act in good faith and exercise reasonable judgement to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remaining out of the room until the matter is decided by the Council".</p> <p>The 'materiality test' attracted a range of diverging views from stakeholders during the review process. While removing the test would provide clear and unambiguous direction to elected members, it also has the potential to diminish the autonomy of elected members in making judgments as to whether conflicts are significant enough to warrant physically removing themselves from deliberations. Further consultation will be undertaken as part of the changes to the Model Code before any changes are made to part 2.</p>

2	'Pecuniary interests' will be removed from Part 2 of the Model Code.	There is some overlap between certain provisions of the Model Code and the Act. Pecuniary interests are one such example where the wording of conflict of interest provisions includes pecuniary interests. Unnecessary duplication between matters that are specifically dealt with by the code and those that are already covered by other offence provisions of the Act will be removed.
3	'Use of Information' will be removed from Part 5 of the Code.	As with pecuniary interests, 'use of information' is another area of overlap between the Model Code and the Act. Section 339 of the Act already deals with misuse of information.
4	Part 7(1)(a) of the Model Code will be re-drafted to limit the requirement on elected members to treat all persons with 'fairness'.	This part of the Model Code should capture the essence of the desired behaviour, while still allowing for frank debate and robust political disagreement. The Government supports the sector's view that the use of terms such as 'courtesy' and 'dignity' in this part of the Model Code can be problematic because they are more subjective.
5	Part 8(5) of the Model Code will be amended by inserting 'publicly' prior to 'undermines the decision of the council'.	This change will bring Part 8(5) of the Model Code in line with Part 8(6) and clarify that the code is focused on an elected members' public conduct, acting in their capacity as a councillor.

Administrative and process improvements

#	Change	Rationale
1	Current complaint forms will be reviewed to ensure there is greater clarity regarding the specific nature of a complaint. For example, complainants should be able to select the descriptor that best applies to the alleged breach of conduct.	Responds to sector feedback and is consistent with the overall objective of improving the 'front end' of the complaints process.
2	Additional guidance will be provided to Panels on the application of 'reasonable person' test in Part 7(1)(b) of the Model Code, which deals with causing 'offence or embarrassment' is sensible. While the Panels should have a sound understanding of this concept (particularly the legal member of the Panel), some guidance to elected members is supported.	Responds to sector feedback and aims to increase consistency in decision-making.
3	Guidance will be provided to Panel members to ensure that prescribed training to address behavioural issues is 'provider-neutral'.	Responds to sector feedback and encourages a more strategic approach to training in the context of the code of conduct process.

	Consideration should also be given to local training provider capacity, with potential to establish a 'panel' of providers that have been assessed as competent at providing specific training types/modules.	
4	Training for Panel members will be reviewed to ensure that members are clear on the limits of the sanctions they apply – that is, sanctions can only be applied to the individual that is the subject to a complaint that has been upheld, and not all councillors	Responds to sector feedback to provide greater clarity in this regard.

4. Next Steps

It is anticipated that legislative and Code amendments will be implemented by the end of 2018, subject to the Government's legislative agenda and other Parliamentary priorities.

The sector will be given a further opportunity to provide input to legislative amendments and changes to the Model Code before they are introduced to the Parliament.

As noted above, there are several ongoing issues in regard to governance and resourcing responsibilities for the Code of Conduct framework, which will require further discussions between the Minister for Local Government and the sector. These matters will be progressed and resolved in parallel with legislative and Model Code amendments

Appendix A: Detailed response to individual local government sector and Panel member recommendations

#	Recommendation	Changes to legislation or Model Code required?	Who proposed the recommendation?	Tasmanian Government Response
Supported				
1	A Statutory Declaration from the complainant and respondent should be required.	Yes, legislative amendment	The sector and Panel members	Supported. Both parties should be willing to attest – 'under oath' - to the honesty of their accounts.
2	Improve the complaint forms to ensure there is clarity regarding the complaint. For example, complainants should be able to select the descriptor that best applies.	No, administrative/process change only	The sector and Panel members	Supported.
3	Enable the Chairs to dismiss trivial complaints.	Yes, legislative change	The sector and Panel members	Supported. The amount of time and resources in dealing with obviously trivial complaints should be reduced to the maximum extent that is reasonably possible without compromising the rigor of the complaints process. Adding 'trivial' would support a reduction in the number of complaints to only those that are material in nature. Currently, the term 'frivolous and vexatious' is too narrow to allow dismissal of 'trivial' matters. Grounds should identify that this is the reason for dismissal.
4	Panels should have the ability to dismiss a complaint at any stage in the process.	No change necessary	The sector and Panel members	Supported, as this is already the case. If a complaint proceeds from the assessment stage to investigation, that investigation could be concluded very quickly if the Panel receives information that would allow it to dismiss the complaint.
5	Remove ability for complainant to amend the complaint once the Panel has commenced its investigation (28X(2)).	Yes, legislative change	The sector	Supported. The Government considers that the Chair should retain the flexibility and discretion to make a decision about accepting an amended complaint, on a case-by-case basis <u>up until the beginning of an investigation</u> . Once a formal investigation has commenced, any additional complaints should be submitted separately and assessed on merit. At a practical level, recommended changes to improve complaint forms (additional substantiation etc) should help address this issue by reducing the incidences of complaints being amended.
6	Exclude pecuniary interest from Part 2 of the Model Code.	Yes, change to Model Code	The sector and Panel members	Supported. There is some overlap between some provisions of the code and the Act. The Government supports streamlining the code with a view to focusing primarily on behavioural matters, and removing unnecessary duplication between matters that are specifically dealt with by the code and those that are already covered by other offence provisions of the Act. Use of information is another area of overlap between the Model Code and the Act. Section 339 of the Act already deals with misuse of information.
7	Prevent the determination report from being tabled in an open council meeting while subject to appeal.	Yes, legislative amendment	The sector	Supported.

#	Recommendation	Changes to legislation or Model Code required?	Who proposed the recommendation?	Tasmanian Government Response
8	The Panel must be appropriately experienced, trained and supported and must demonstrate they can perform the role before being appointed.	No, administrative/process issue	The sector and Panel members	<p>Supported noting that the Panels as constituted represent what the sector requested (two persons with local government experience, one being the Chair, and a legal representative).</p> <p>The Government also notes that in the last recruitment round to add to the list of Panel members to select from, the selection Panel was drawn entirely from nominations from the sector. The Government proposes to continue this approach into the future, so that Panel members will be persons nominated by the sector itself.</p> <p>Code of Conduct Panels will primarily be challenged in the area of its application of natural justice and this is the appeal mechanism for the Magistrates Court Civil Division. Therefore as a minimum the legally trained person should have training in administrative law principles of procedural fairness, evidence and bias. Ideally all members of the Panel would receive this training.</p>
9	The Chair must have the experience to both control and lead the interview process and not allow too much leeway for comments outside the scope of the complaint.	No, administrative/process issue	The sector	Supported. See comments above.
10	Clarify that Panel chairs are obliged to refer matters that are the jurisdiction of the Director of Local Government, prior to a full Code of Conduct process.	No change necessary	The sector	Supported as this is already provided for in the Act.
11	Information on complaints upheld (as a minimum) should be reported as part of the Annual Report.	Yes, legislative amendment if reporting requirements are extended	Panel members	<p>Supported. The Government notes that section 72 of the Act already requires the following in council annual reports:</p> <ul style="list-style-type: none"> • A statement of the number of code of conduct complaints that were upheld either wholly or in part during the preceding financial year; • The total costs met by the council during the preceding financial year in respect of all code of conduct complaints dealt with under Division 3A of Part 3 during the preceding financial year. <p>Reporting could be extended to also include total number of complaints received.</p>
12	Explicitly prevent parties from misusing information they obtain as part of a code of conduct investigation.	Yes, legislative amendment	Panel members	Supported. The Government notes that section 339 of the Act could be amended to include information obtained by any party (including Panel members) via a code of conduct investigation.
13	Reinforce confidentiality requirements.	Yes, legislative amendment	Panel members	Supported. Amend section 28KZ of the Act to prescribe that Determination Reports must be kept confidential until they are formally tabled by the relevant council.
14	Require determination reports to be on the agenda of open council meetings.	Yes, legislative amendment	Panel members	Supported. While 'tabling' is already provided for under section 28ZK of the Act, this does not always result in the matter being placed on the agenda.
15	Obligation on Director to advise Panel when a matter should have been referred to Director.	No	Panel members	Supported as this is already the case.
16	Additional step in process – three days to allow respondents a chance to review and respond to proposed sanctions.	No	Panel members	Supported. The Government understands that this process has been adopted and is already in effect.

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17	Clarify responsibility for training costs.	Yes, legislative amendment	Panel members	Supported. Amend section 28ZN of the Act to clarify that costs of training that might be required of a councillor as a result of Determination Report are to be borne by the relevant council, and not the individual councillor.
18	Improvements needed in regard to the receipt, checking and processing of complaint forms.	No	Panel members	Supported. The Government notes that councils could give consideration to whether the General Manager should continue to perform the function of receipt, checking and processing of complaint forms or, in their interests of ensuring that the General Managers are not put in potentially difficult positions, if it could be delegated to an 'authorised officer' (e.g. similar to Right to Information Officers at the State Government level). The Government considers these concerns will be ameliorated through guidance, support and education.
19	Limit 7(1)(a) of the Model Code to fairness.	Yes, change to Model Code	The sector and Panel members	Supported. This part of the Model Code should capture the essence of the desired behaviour under this part of the code, while still allowing for frank debate and robust political disagreement. The Government supports the sector's view that the use of terms such as 'courtesy' and 'dignity' in this part of the Model Code can be problematic because they are more subjective.
Supported in principle				
20	Introduce a mechanism for mediation or a requirement to demonstrate that mediation has been attempted.	Yes	The sector and Panel members	<p>Supported in principle. Mediation should be pursued where it presents the reasonable prospect of resolving the matter without recourse to formal administrative/statutory processes.</p> <p>However, mediation will not always be appropriate and should be assessed on a case-by-case basis.</p> <p>The Government proposes instead that a 'reasonable efforts to resolve' test be placed on complainants before a complaint is accepted under 28V of the Act, and that the Chair be given the flexibility to judge what is reasonable in the circumstances on a case-by-case basis. This proposal would generally only apply to Part 7 of the Model Code and possibly some of Part 8.</p>
21	The Chair should be able to seek preliminary advice from the General Manager to consider other matters before dismissing or proceeding with a complaint.	Potential legislative change	The sector	<p>Supported in principle. The initial assessment by the Chair is intended to be undertaken based on the documentary evidence provided. This could be extended to include any relevant documents (e.g. meeting minutes etc.) provided by the General Manager (if available and relevant).</p> <p>However, there are concerns that seeking additional advice from the General Manager in addition to the above documents may in some cases create a perception of bias (eg where there has been conflict in the past between an elected member and a General Manager), with the attendant risk of damaging relationships between the General Manager, elected members and council staff.</p> <p>An alternative would be to provide additional scope for the Chair to obtain information or advice that the Chair may draw on in making an initial assessment, but this then starts to enter the realm of 'pre-emptive investigation' before the initial assessment has even been completed.</p> <p>Other changes aimed at reducing the number of complaints proceeding to full investigation and determination will likely address the practical concern reflected in this recommendation. So too should any complaints resolution procedures that a council may put in place to resolve issues before they escalate to a formal code of conduct complaint.</p>

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22	Include recognition of a councillor exposing fraud or other illegal activity as not offending Part 3 (1) of the Model Code.	Yes, change to Model Code	The sector	<p>Supported in principle. The Government supports the intent, but does not believe this is technically necessary. It seems self-evident that any disrepute brought upon council as a result of the revelation of unlawful or unethical behaviour is caused by the person responsible for those actions (and not any person acting to uncover them). Further, the <i>Public Interests Disclosures Act 2002</i> already covers the field in relation to this issue.</p> <p>The Government also recognises the risk that a small minority of persons may falsely raise allegations of significant impropriety for political or other reasons. Where this is found to be the case the Code or the Act should be able to deal with those persons.</p>
23	Include an explanatory note regarding a 'reasonable person' to support interpretation of Part 7(1)(b) of the Model Code.	Yes, change to Model Code if explanatory note included in body of code.	The sector and Panel members	<p>Supported in principle. The provision of additional guidance to Panels on the 'reasonable person' test is sensible. While the Panels should have a sound understanding of this concept (particularly the legal member of the Panel), some guidance to elected members is supported.</p> <p>This could be achieved by a supporting guideline and through elected member and Panel training, rather than through a change to the code itself. Concerns about interpretation of 7(1) are likely to be ameliorated by a re-draft and tightening of that section (see above).</p>
24	Remove "undermines the decision of the council" from Part 8(5) of the Model Code.	Yes, change to Model Code	The sector	<p>Supported in principle. The spirit (if not the letter) of the Act with respect to the role and responsibilities of councillors is that once a decision is made, then an individual councillor should not publicly criticise a decision of council (noting that council voting records are public documents).</p> <p>On this basis, the Government does not support any weakening of the code to allow for public dissent regarding council decisions, instead the Government proposes inserting 'publicly' prior to 'undermines the decision of the council'.</p> <p>Similar to recommendation 23, the Government considers showing 'respect' when expressing personal views publicly, as in Part 8(6), is important to capture the essence of the desired behaviour under this part of the Code.</p>
25	Once the Panel is notified of a complaint the General Manager should be required to table the complaint in the next available Closed Session of Council and the Mayor or Deputy Mayor (if complaint relates to the Mayor) should be notified immediately.	Yes, legislative change	The sector	<p>Supported, in principle. The Government supports the intent of providing council with forewarning of complaints where this is deemed necessary and appropriate. The Government understands that this is already possible without having to prescribe that it occurs.</p> <p>There is a need to ensure procedural fairness/natural justice are not adversely impacted as a consequence. A matter referred by a Panel for example to the Director as a possible offence under the Local Government Act should not be disclosed. Panel members suggest that it is important that confidentiality of the process is maintained until the determination is completed.</p> <p>Matters that proceed to investigation after the assessment stage could, in principle, be reported in session, but - in the interests of natural justice - the right to confidentiality for both complainant and councillor should be maintained. This would mean only limited, de-identified information could be provided (eg number of complaints received and basis of the complaint).</p> <p>The Government believes it is unnecessary to prescribe this in legislation, instead it should be left to</p>

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				the continued discretion of councils.
26	Code of Conduct sanctions should only be imposed on those against whom the complaint is made.	No changes necessary	The sector and Panel members	<p>Supported in principle. The Government believes this is a perceived risk, as opposed to an actual problem with the Code. Panels would have no jurisdiction to issue sanctions beyond those councillors who are subject to a complaints process. This issue will be covered in training for Panel members.</p> <p>To the extent that systemic or cultural issues with a council may be signalled by repeat complaints on similar matters against a number of councillors, this should trigger consideration of 'whole of council training' as a recommendation or suggestion by the Panel.</p> <p>The Government understands that some Panels have in fact made these types of suggestions, but they have never been issued as 'sanctions'.</p>
27	In relation to sanctions involving training, the Panels should only be able to direct that training be undertaken, and that training is to include certain matters. The Panel should not be able to bind a third party to provide that training.	No changes necessary	The sector and Panel members	<p>Supported in principle. Prescribed training to address behavioral issues should be 'provider-neutral'. Again, this matter can be covered in training for Panel members.</p> <p>Consideration should, however, be given to local training provider capacity, with potential to establish a 'panel' of providers that have been assessed as competent at providing specific training types/modules. This is an administrative matter that can be progressed within the current framework.</p>
Noted				
28	Conflicts of Interest – remove 'materiality test' from Part 2(6) of the Model Code of Conduct.	Yes, change to Model Code	Panel members and some parts of the sector	<p>The Model Code currently provides that elected members are to "...act in good faith and exercise reasonable judgement to determine whether the conflict of interest is so material that it requires removing himself or herself physically from any Council discussion and remaining out of the room until the matter is decided by the Council".</p> <p>The 'materiality test' attracted a range of diverging views from stakeholders during the review process. While removing the test would provide clear and unambiguous direction to elected members, it also has the potential to diminish the autonomy of elected members in making judgments as to whether conflicts are significant enough to warrant physically removing themselves from deliberations.</p> <p>Therefore, further consultation will be undertaken as part of the changes to the Model Code before any changes are made to part 2.</p>
29	Fixed costs incurred by the State Government for the Executive Officer role and associated Panel support should not be "cost recovered" from councils.	No, administrative/process issue	The sector	<p>Noted.</p> <p>While noting the recommendation, the costs of this function are real and must be borne by someone. It is common practice across a number of sectors for a regulated entity to fund certain costs associated with its own (independent) regulation. The Government understands the sector's position that this is a responsibility for Government. This will form part of a broader discussion that will occur with the sector regarding resourcing and responsibility.</p>

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30	<p>Clarification is required on who holds the responsibility for overseeing the effective implementation of the framework and the governance model.</p> <p>Panel members suggested the need to ensure clear delineation between the role of Panels and that of the Director.</p>	Potential legislative change required	The sector and Panel members	<p>Noted.</p> <p>While the Government is responsible for administration of the legislative framework, there is a 'blurred' line as where the separation of this role occurs and the overall support for the framework. One option is that an enhanced Executive Officer role could do more than simply provide the executive support to the Panel on each individual complaint, but also provide for the more general administration and support for the framework. Such an option would support the statutory separation of the Code of Conduct from the Director of Local Government.</p> <p>However, critical to any solution is funding and resourcing. For further discussion with the sector and the Minister.</p>
31	A greater commitment to providing guidance and support for councils and Panel members is required.	No, administrative/process issue	The sector and Panel members	Noted. See comments above.
32	An Executive Officer role could provide for the more general administration and support for the framework, rather than just executive support to the Panel on each individual complaint.	No	Panel members	Noted. See comments above and recommendation 29.
33	<p>Measures to support Panel members to improve the consistency and quality of investigations, hearings and determinations, for example:</p> <ul style="list-style-type: none"> • Recording of hearings and supporting protocols • Development of practice manuals • Decision templates 	No	Panel members	Noted and supported in principle. These matters can be progressed without any substantive changes to the framework, but will require time/resource investment. Again, this is part of the broader discussion regarding resourcing and responsibility (see above), for further discussion with the sector and Minister.
34	The process for determining variations to the Model Code (Clause 28T of the Local Government Act) and the rationale for denying a variation needs a greater level of transparency.	No change necessary	The sector	<p>Noted. Part of the argument from the sector to Government to introduce the Model Code was for a minimum, uniform code of conduct to apply across all councils. While variations are allowed, in principle these variations would only apply where a council sought to vary the code above the minimum standard in the Model Code. It should be noted that the greater the inconsistency between councils in terms of codes of conduct, the greater the likely associated costs of the system (Panels having to be familiar with multiple, bespoke codes).</p> <p>Any future consideration of a request to vary the code by a council would include reasons for agreeing or denying the request, consistent with past practice.</p>
35	<p>The the Government is requested to provide legal advice as to the consequences of changing the drafting in the Change "is to" to "must" in the following sections of the Act:</p> <p>28V (3), 28ZA (1), (2), (3a), (3b) 28ZC (1b), (5)</p>	Yes, legislative change	The sector	Noted. The Government defers to the Office of Parliamentary Counsel (OPC) on technical matters of drafting. The Government has previously been advised that there is a legal reasoning for the use of 'must' and 'is to' in various contexts and understands that 'must' effectively denotes something is mandatory with no discretion, whereas 'is to' is still directory in nature, but may be used in situations where some level of minor procedural discretion may be appropriate or acceptable (e.g. where a particular administrative action is to be undertaken by a person or persons). The Government considers the current drafting is appropriate in this context.

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	28ZF (4), (6b) 28ZG (1) 29ZJ (1) 28ZK (2), (4)			
Not supported				
36	The Model Code should make it clear that a complaint cannot be lodged related to a planning decision.	Yes, change to Model Code	The sector	<p>Not supported. The Government appreciates that a framework for appeals and complaints already exists for when a council is acting as a planning authority (i.e. the Resource Management Planning and Appeals Tribunal [RMPAT]).</p> <p>However, the practical risk is that the RMPAT process would generally only result in an 'overturning' of a planning decision, and not necessarily a sanction against an individual councillor who, for example, deliberately and knowingly votes not in accordance with the planning authority obligations he or she has.</p> <p>If there is no individual sanction available, there is a risk of increased decisions not being made in accordance with planning authority obligations. There have been examples where valid code of conduct complaints have been upheld on this basis, which could no longer occur if this recommendation were adopted.</p> <p>In other words, the Government considers that there is a strong argument that councillors should still be accountable for their <i>individual</i> conduct when dealing with planning matters, in addition to the <i>collective</i> decisions of council being subject to appeal via RMPAT.</p>
37	Councillors whose conduct is being reviewed by a Panel should have the option of appearing before the Panel.	Yes, legislative change	The sector	<p>Not supported. The Panel should deal with written submissions, unless convinced otherwise on a case-by-case basis. The Government would caution that further consideration of the potential cost and complexity associated with this practical ramifications of this recommendation is required. This change may lead to an expectation that complainants are also given this opportunity adding further to potential cost/complexity.</p> <p>On the one hand concerns have been raised with the cost and length of the Panel process, but this recommendation would likely increase costs and complexity/time intensity.</p> <p>The framework as established is not a court and was designed to allow the Panel to make a determination if the evidence is clear, without a hearing. The Panel should have the discretion to decide whether a hearing is necessary in the context of the complaint in question.</p>
38	The legislation should require a General Manager to notify a subject of a complaint once the General Manager has determined the complaint meets the requirements of Section 28V of the Act.	Yes, legislative change	The sector	<p>Not supported. In the interests of procedural fairness, the subject of a complaint should receive notification from the Panel Chair once the Chair has undertaken the initial assessment under section 28ZA.</p> <p>In saying that, there is technically nothing to prevent this happening at present. The Government believes it is not necessary to prescribe this, instead it should be left to the continued discretion of councils.</p>

#	Recommendation	Changes to legislation or Model Code required?	Who proposed the recommendation?	Tasmanian Government Response
39	Remove ability for the Panel to compel a councillor to apologise.	Yes, legislative change	The sector and Panel members	Not supported. The concern seems to be that an enforced apology is insincere or meaningless. While the Code cannot 'regulate for sincerity', it does not necessarily follow that an apology serves no purpose for the complainant. A public apology is a common sanction used in relation to civil actions, and in disputes that are heard in other similar forums (panels, tribunals etc.) An unwillingness to apologise will likely be read as the rejection by the subject of the complaint of the findings of the panel and/or a lack of contrition, with the potential to undermine the framework more generally.
40	Timeframes should be included for the formation of the Panel (within 4 weeks of the complaint being referred) and for a hearing to be held (within 30 days of the formation of the Panel) and for making the determination (30 days from the date of the hearing).	Yes, legislative change	The sector	<p>Not supported. All parties have an interest in, and support, the efficient administration and determination of Code of Conduct complaints. However, at a practical level, resourcing constraints associated with the Executive Officer role and the availability of Panel members is already challenging within the existing timeframes.</p> <p>With respect to the latter issue, it is important to remember that Panel members must manage their part-time Panel responsibilities and time commitments alongside their other substantive commitments. Councils have expressed concerns regarding costs and this must be balanced against potential changes.</p> <p>Further, other recommendations put forward by the sector have the potential to add further time/complexity to the process, which would make mandated resolution of complaints within four weeks even more challenging.</p> <p>It is noted that, of the 16 complaints that have proceeded beyond the initial assessment and have been completed, only four were outside the legislative timeframe of 90 days.</p>
41	There should be removal of a Panel's ability to exceed timeframes and appropriate resourcing put in place to ensure timelines are met.	Yes, legislative change	The sector	Not supported. See comments above.
42	The cost of lodging a complaint should be the same as the cost for lodging a planning appeal to the Resource Management and Planning Appeal Tribunal.	No	The sector	<p>Not supported. The cost of lodging a complaint should cover some of the cost of processing and administration and be set at a level which prevents the lodgment of trivial complaints on the one hand, while not acting as a financial barrier to lodging a legitimate complaint on the other.</p> <p>The principle should be cost recovery for administration and processing.</p>
43	If a complaint is found to be frivolous and vexatious, the Panel should have the ability to award costs against the complainant.	Yes, legislative change.	The sector	<p>Not supported. The code of conduct complaints process is not intended to act as a 'court' and in any case there are no relevant 'damages' to be taken into account. Having a system where the parties to a complaint could be liable for costs would likely both act as a deterrent to the lodgment and defence of legitimate complaints, and to individuals considering running for elected office.</p> <p>Increased ability to dismiss trivial complaints early in the process should help reduce overall cost of complaints system.</p>