

Strengthening the Local Government Code of Conduct Framework

Tasmanian Government response to public consultation December 2021

Overview

The Local Government Code of Conduct Framework requires Tasmanian councillors to conduct themselves in accordance with a minimum set of behavioural standards and provides for sanctions in instances where those standards are breached. Recently, there has been significant public commentary about whether the Code of Conduct Framework is achieving its objectives and how it could be improved.

Following several earlier initiatives, in August 2021 the Government consulted the community on several proposed targeted legislative amendments to further strengthen the Code and its implementation. The proposed amendments included:

- further strengthening and clarifying the grounds for the Code of Conduct Panel Chairperson to dismiss complaints at the initial assessment stage, in particular through the introduction of a new 'public interest' test;
- removing a perceived conflict of interest for the Code of Conduct Panel Chairperson at the initial assessment stage and ensuring that a legal member of the Panel undertakes all initial assessments;
- wherever practicable, improving confidentiality requirements in relation to the formal Code of Conduct complaints process; and
- improving council dispute resolution policies to minimise the number of issues that are escalated to the Code of Conduct Panel in the first place.

Consultation feedback broadly supported these proposals. Several additional supporting changes were also identified during the consultation period. Appendix I outlines the key messages from submissions to the Discussion Paper and explains how the Government has decided to respond to the main issues, concerns, and ideas that were raised.

Overall, there appears to be a strong view in the community and the sector that very minor, low-level behavioural complaints currently consume too much attention and resourcing in the Code of Conduct process on the one hand, while on the other hand the framework is not adequately equipped to appropriately sanction more serious and/or repeated breaches.

A number of submissions also raised issues that are outside the scope of what can be delivered within the current targeted review and contemplated more fundamental changes to how complaints about elected member conduct should be handled.

Having considered the broad range of feedback received, the Government has decided it will proceed with a suite of immediate changes to the current framework, including some additional reforms to those that were proposed in the August Discussion Paper. Additional reform measures principally respond to suggestions from the sector and the community that there could be greater clarity, consistency, and efficiency in the handling of behaviour-related complaints, particularly at the less and more serious ends of the misconduct spectrum.

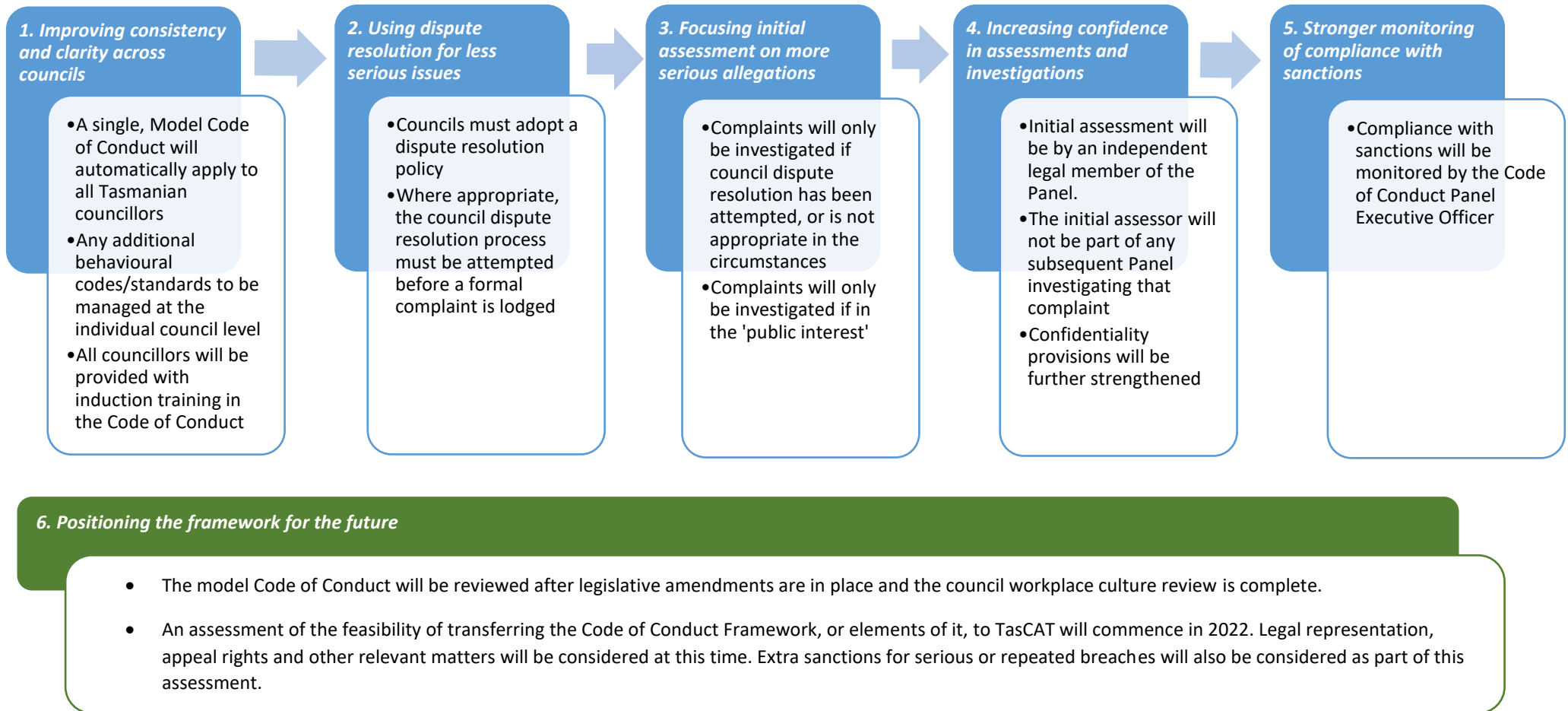
Beyond these immediate reforms, the Government is also committing to undertake further work to ensure the Code of Conduct Framework remains effective, and is supported, respected, and trusted by the community and the local government sector alike.

The Government's response proposes reform across the following six key areas:

1. Improving consistency and clarity across councils
2. Using dispute resolution processes for less serious matters
3. Focusing initial assessment on more serious allegations
4. Increasing confidence in the assessment and investigation process
5. Stronger monitoring of compliance with sanctions
6. Positioning the framework for the future

The Government's package of commitments to improving the Code of Conduct Framework are explained in more detail below and summarised in Figure 1. The Government will introduce amendments to the *Local Government Act 1993* (the Act) in the 2022 Autumn session of Parliament to implement its immediate reform package. Draft legislation will be released for public consultation in early 2022.

Figure 1: Targeted reforms to the Code of Conduct Framework – Summary



Reform Area I – Improving consistency and clarity across councils

Summary of proposed changes:

- **Councils will no longer be required to formally ‘adopt’ the Model Code of Conduct. The Model Code will automatically apply to all Tasmanian councillors.**
- **Individual councils will be able to adopt additional requirements in relation to elected member behaviour, but compliance with any such requirements will need to be managed by the council itself and will not be within the jurisdiction of the Code of Conduct Panel.**
- **All councillors will be provided with induction training in the Code of Conduct.**

The Code of Conduct Framework was first introduced in 2016 to provide for a standardised model for the conduct of all Tasmanian councillors. Prior to 2016, there was no consistent, state-wide approach for dealing with councillor conduct matters, with each council responsible for developing and adopting their own codes of conduct.

However, the Act still requires that individual councils adopt their own code of conduct based on the Model Code, and contemplates variations to the Model Code, subject to the approval of the Minister.

Part of the feedback received was that the definitions and expectations under council codes of conduct were not always clear. Local variations to the Model Code of Conduct have the potential to add to this lack of clarity while also complicating their interpretation by councillors, councils and the Code of Conduct Panel.

In line with the intent of the Model Code to apply a single set of consistent behavioural standards to all Tasmanian councils, and to remove the inefficient administrative requirement for councils to formally ‘adopt’ the Model Code, the Act will be amended so that all Tasmanian councils will simply be required to act in accordance with the Model Code. As noted above, the Government will separately undertake a review of the Model Code to ensure it is still appropriate and has broad sector and community support.

The Act will also be amended to specifically provide for councils to adopt additional requirements in relation to elected member behaviour above and beyond what is required by the Model Code. However, where councils do this, any such requirements will not be taken in any way to ‘override’ the Model Code, and the council itself will need to manage elected members’ compliance and accountability with those requirements.

The Government will also look to enhance and bring forward an approved reform, previously agreed under the *Review of the Local Government Legislative Framework*, concerning improved education and training opportunities for councillors. General managers will be required to develop a core-capability induction plan for councillors prior to their first council meeting that will include Code of Conduct training. Completion of core-capability induction training should

be undertaken by all councillors following an election process. A councillor's completion of these induction programs will be reported to the Director of Local Government, giving the Director greater oversight in relation to the education programs which all councillors should be participating in.

Reform Area 2: Using dispute resolution for less serious issues

Summary of proposed changes:

- ***Tasmanian Councils will be required under the Local Government Act 1993 to have a dispute resolution policy and supporting processes that meet certain minimum prescribed standards***
- ***When lodging a Code of Conduct complaint, the complainant will need to provide relevant information about any attempts they have made to resolve the issue through a council's established dispute resolution process.***

The Code of Conduct has always been intended to act as a last, not first, resort for addressing elected member behavioural issues. Changes to the Code of Conduct Framework introduced in 2018 reinforced this by requiring complainants to provide information about efforts, if any, they had undertaken to resolve the issue that is the subject of their complaint. The changes also allowed for the dismissal of a complaint at the initial assessment phase if the Panel Chairperson considered such efforts were inadequate in the circumstances.

Both the community and elected members are right to expect that complainants will make genuine efforts to attempt to resolve less serious disagreements and disputes at the council level, without immediate reference to an external body. This is particularly the case where the complainant is a fellow councillor. However, recent experience shows that, in many cases, issues that result in complaints to the Code of Conduct Panel could and should be addressed and resolved through other mechanisms.

Given recent feedback – including in submissions to the current review - it has become clear that the efficiency, effectiveness, and ongoing credibility of the Code of Conduct Framework will depend to a large extent on there being a robust and consistent set of arrangements for dispute resolution across all councils. There is no point requiring complainants to show how they have tried to resolve an issue with an elected member prior to lodging a complaint if informal dispute resolution processes are inadequate, or indeed non-existent.

Therefore, the Government is proposing two amendments that will require councils and community members to take more responsibility for resolving less serious disputes and personal grievances at the local level. The objective is to build a stronger culture of professionalism and mutual respect and reduce the costs to the community of the formal Code of Conduct Panel process.

Firstly, the Act will be amended to require all councils to develop, adopt and publish a dispute resolution policy and implement supporting processes as the first step in dealing with

complaints about the behaviour of elected members. While the Act will establish minimum content and certain procedural elements or principles for council dispute resolution policies, councils will have flexibility in how they structure their policy, which may include the option of engaging an independent mediator. A number of councils already have these policies and processes in place, and it is expected that LGAT will play a key role in supporting councils to adopt a set of consistent and robust approaches that also suit their individual circumstances.

Secondly, the current requirement on Code of Conduct complainants to provide information on efforts undertaken to resolve a matter that is the subject of a complaint will be further strengthened to include specific reference to using the relevant council's dispute resolution policy and process. A failure to attempt resolution through council-level processes will be included as clear grounds for a complaint to be dismissed at the initial assessment stage, should the initial assessor consider it would have been appropriate in the circumstances to use those processes. In making this assessment, the Code of Conduct Panel will be able to seek further information from both the complainant and council on any dispute resolution process that has been attempted.

Of course, not all issues will be able to be resolved by dispute resolution mechanisms. There will always be circumstances where, either because of the specific nature or seriousness of the conduct itself, or perhaps because of sensitivities or power imbalances between the parties involved, it is appropriate that elected member behaviour is referred directly to the Code of Conduct Panel.

This is why dismissal on the grounds of insufficient dispute resolution effort will remain a discretionary decision of the initial assessor, based on the specific circumstances of each individual matter.

Reform Area 3 – Focusing initial assessment on serious allegations

Summary of proposed changes:

- ***The initial assessor will be given greater flexibility to dismiss complaints where, in their view:***
 - ***the complainant has not made a reasonable attempt in the circumstances to address the matter through other avenues (including the council's own dispute resolution process), and/or***
 - ***they believe it is not in the public interest to proceed to an investigation.***

With more robust dispute resolution processes in place at the council level, fewer complaints should need to progress to the Code of Conduct Panel. However, where they do, the community and sector should be confident that only those complaints that merit formal investigation by the Code of Conduct Panel proceed to that process.

The initial assessment process will be adjusted to allow for specific consideration of the use or otherwise of council dispute resolution policies. With a new statutory requirement for councils to have dispute resolution policies in place it will be easier for the initial assessor to determine whether efforts at resolving the complaint have been reasonable in the circumstances. If, in the view of the assessor, a reasonable attempt has not been made, they will be empowered to refer it back to the council so that this can be attempted before a formal Code of Conduct complaint is accepted.

A new public interest test will also be introduced at the initial assessment phase. This test will consider such matters as the nature and seriousness of the alleged misconduct. Without limiting the design of this amendment, it will be informed by the provisions of the *Integrity Commission Act 2009* so the experience from that Act can provide some clarity around definitions. To improve public understanding and confidence in the complaints process, the Government will publish explanatory material on the operation of the Code of Conduct process and terms such as 'frivolous', 'vexatious' and 'trivial', which are also grounds for dismissing a complaint during the initial assessment.

Reform Area 4 – Increasing confidence in assessments and investigations

Summary of proposed changes:

- ***Councils will be required to process Code of Conduct complaints within 14 days of receipt (currently, there is no legislated timeframe).***
- ***The initial assessment of complaints will be undertaken by a legal member of the Code of Conduct Panel, who will be precluded from sitting as part of a Panel in relation to any subsequent investigation.***
- ***All Panel members will be required to pro-actively disclose any potential conflicts of interest when investigating a complaint.***
- ***It will be an offence for any person to disclose information, documents or records provided to them by the Executive Officer or the Code of Conduct Panel in relation to a complaint, unless it has already been publicly disclosed in a determination report.***

A significant proportion of the feedback responding to the Discussion Paper focused on ongoing concerns with the efficiency, integrity, and consistency of both the initial assessment and investigation and determination process. For this reason, three key changes are proposed.

Firstly, a clear timeframe will be put on councils' processing of complaints. Code of Conduct complaints are first lodged with council general managers, whose role is to check that they meet a number of basic administrative requirements under the Act. There is currently no requirement for councils to process complaints within a reasonable timeframe, which leaves open the possibility of lodged complaints being held up indefinitely by the council. To ensure

prompt attention to all complaints, general managers will be required, within 14 days, to either forward the complaint to the Code of Conduct Executive Officer, or request that the complainant address any non-compliance and re-submit.

Secondly, the Act will be amended to require that all initial assessments are undertaken by a legal member of the Panel. The initial assessor will also be precluded from sitting as part of the Panel for any subsequent investigation. Taken in conjunction with the use of recently-developed Initial Assessment Guidelines, this will ensure a more consistent process, while also removing any perceived conflict of interest of the initial assessor progressing a matter to investigation. The Act will also be amended to require that all Panel members disclose and manage any potential conflicts of interest when investigating a complaint.

Thirdly, the Government will broaden the Act's confidentiality provisions to prevent any person from disclosing information, documents or records provided to them by the Executive Officer or the Code of Conduct Panel in relation to a complaint, unless it has already been publicly disclosed in a determination report. An exception will be made so that general managers and mayors can discuss a determination report with each other for the purpose of arranging for the report to be tabled at a council meeting.

These amendments should help to maintain public confidence in the integrity of the Code of Conduct process, reducing the risk that complaints are aired publicly before they have been determined.

Reform Area 5 – Stronger monitoring of compliance with sanctions

Summary of proposed changes:

- ***Compliance with sanctions will be monitored by the Code of Conduct Executive Officer, (currently this is the responsibility of the General Manager).***

The Act will be amended to require councillors to notify the Code of Conduct Panel Executive Officer when they have complied with or completed the requirements under a sanction. Currently, the council general manager is responsible for monitoring compliance, and notifying the Director of Local Government of any non-compliance. Given the sanctions are imposed by the Code of Conduct Panel, it is more appropriate for the Panel be monitoring compliance than the general manager. The role description and grade of the Executive Officer position will be reviewed to take account of the additional responsibility of compliance monitoring and other changes in the administrative framework.

Reform Area 6 – Positioning the framework for the future

Summary of proposed changes:

- ***The model Code of Conduct will be reviewed, following implementation of the proposed legislative amendments and completion of the sector’s review of local government workplace culture.***
- ***An assessment of the feasibility of transferring the Code of Conduct Framework, or elements of it, to TasCAT as part of a future tranche of reforms will commence in 2022.***
- ***As part of the feasibility study, legal representation, appeal rights and additional sanctions for serious and/or repeated Code of Conduct breaches will be considered.***

Once the reforms outlined have been delivered, the Government will undertake a number of other actions to strengthen the Code of Conduct Framework.

The first component of this additional work will be to review the Model Code of Conduct. This review will commence after the Act amendments outlined here are in place and following the implementation of the current package of reforms (noting that changes to the Code can be delivered by Ministerial Order and do not require legislative amendment).

It needs to be noted that, while the Code of Conduct Framework plays an important role in maintaining standards of behaviour for elected members, it cannot in and of itself guarantee a safe working environment. Nor does it ensure that councils have appropriate policies and procedures in place to deal with harassment, bullying and discrimination. This is why, ideally, a review of the Model Code would take into consideration findings from a workplace cultural review of local government, which is being led by the sector. For this reason, any review of the Model Code of Conduct should occur after this process has completed.

The second component will be a feasibility study into transferring administrative responsibility for the Code of Conduct Framework (or certain elements of the framework) to the new Tasmanian Civil and Administrative Tribunal (TasCAT).

Legislation to establish TasCAT was passed in 2020, and a number of tribunals and boards are flagged to become part of TasCAT in 2021. There is potential for other bodies to become part of TasCAT in the future.

A number of submissions suggested that, because Code of Conduct processes can have serious impacts on parties to a complaint, there should be a more formal approach involving legal representation. Others have suggested that allowing legal representation would exclude people with less access to legal knowledge and resources.

The feasibility study, to commence in 2022, will consider the practical implications of the transfer in close consultation with the sector. The study will also provide the opportunity to

consider changes to the Framework that might be appropriate in the context of TasCAT, including questions about legal representation and appeal rights.

The need for additional sanctions for serious or repeated Code of Conduct breaches will also be considered as part of this study. The Government has heard that the number of Code of Conduct complaints being upheld is still too high. While it is important that there are robust processes in place to ensure that less serious behavioural issues can be dealt with outside of the Code of Conduct Framework, it is also crucial that the process can appropriately deal with serious breaches where they are upheld.

Currently, when a complaint is upheld, the Code of Conduct Panel can impose a number of sanctions:

- a caution;
- a reprimand;
- a requirement to apologise;
- a requirement to attend counselling or a training course; or
- suspension from performing as a councillor for up to three months.

If a councillor is suspended three times within two consecutive terms as a councillor, the Minister can recommend to the Governor that the councillor be removed from office.

Some of the sanctions used in other jurisdictions that could be considered in Tasmania, include:

- a requirement to reimburse the council for some or all costs arising from the councillor's inappropriate conduct, including the costs of investigating the complaint, and/or associated training;
- suspension from the right to receive councillor allowances for up to 3 months while continuing to serve as a councillor;
- suspension from chairing a delegated committee of the council; and
- suspension from a position representing the council, other than the office of councillor.

Stronger sanctions would provide the community with confidence that serious behavioural misconduct will be dealt with and send a clear message to the sector that the obligations of elected members to hold themselves to high standards of behavioural and ethical conduct should not be taken lightly.

Appendix 1: Summary of Community Feedback on the Discussion Paper

The public consultation period on the Discussion Paper ran for five weeks and ended on 9 August 2021. Twenty-eight submissions were received from across the local government sector, community members and other Tasmanian Government agencies. Submissions are available to view on the Department of Premier and Cabinet's website. Of these 28 submissions:

- 18 were from councils, councillors or private individuals who had been directly involved in a determined Code of Conduct complaint;
- 17 were from the local government sector – councils, current or former councillors or the Local Government Association of Tasmania;
- 5 were from private individuals who were not former councillors; and
- 5 were from State Government agencies.

The submissions strongly supported the Code of Conduct process in principle, and recognised its important role in setting behavioural and conduct standards for Tasmanian councillors. There was also strong support for strengthening the Code of Conduct process to make it more effective.

Most submissions supported the proposed changes, with some making helpful specific suggestions about how they could be implemented to have more impact. The proposed changes, summary of submissions and government response are outlined below.

1. Further strengthen and clarify the grounds for the Panel to dismiss complaints at the initial assessment stage.

Proposal	<p>A broader public interest test would be included in the <i>Local Government Act 1993</i> (the Act) as part of the initial assessment process. A public interest test would include such matters as assessing complaints for seriousness, the availability of evidence, the level of public concern, demonstrated actions taken to deal with the matter, and whether the matter may be a sign of more widespread or systemic problems. The requirement for complainants to use the council-administered dispute resolution process, including mediation, before submitting a complaint would be strengthened.</p>
Submissions summary	<p>There was general support for introducing a public interest test at the initial assessment stage. Many submissions stressed the importance of the public interest test being well defined, as well as clearly defining the other grounds for dismissing the complaint at this stage.</p> <p>While there was general support for requiring complainants to use council dispute resolution processes before lodging a complaint, some submissions did not support this approach. They were concerned that a council-administered process would not be fair or independent for complainants. A number of submissions suggested that independent arbiters be appointed to resolve disputes locally.</p>
Government response	<p>The Government will amend the Act to introduce a public interest test into the initial assessment phase. This test will be informed by provisions of the <i>Integrity Commission Act 2009</i> so the experience from that Act can provide some clarity around definitions.</p> <p>The Government will publish explanatory material on the operation of the Code of Conduct process and terms such as 'frivolous', 'vexatious' and 'trivial'.</p> <p>The Government will amend the Act to require councils to complete the development of their dispute resolution policies. Councils will be able to include the option of an independent mediator in their processes.</p>

2. Remove a perceived conflict of interest and empower a legal member of the Panel to undertake the initial assessment process.

Proposal	<p>To address a perception of a conflict of interest, the member of the Code of Conduct Panel who undertakes the initial assessment of a complaint would not be part of any Panel that was subsequently convened to investigate that complaint. As initial assessments may involve a range of legal and procedural considerations, and would now also include a public interest test, a legal member of the Code of Conduct Panel would undertake the initial assessment.</p>
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Submissions summary	Most submissions supported the proposal that the Panel member who does the initial assessment is not part of any subsequent Panel investigating that complaint. A small number of submissions felt that a legal member of the Panel was not necessarily best placed to make the initial assessment, and that someone familiar with local government would be more appropriate.
Government response	<p>The Government will amend the Act to ensure that a legal member of the Code of Conduct Panel undertakes the initial assessment of a complaint, and to exclude that member from any Panel convened to investigate that complaint.</p> <p>The Government will also require Panel members to disclose any potential conflicts of interest when investigating a complaint.</p> <p>The Government will ensure that, when recruiting legal members to serve on Code of Conduction Panels, it will take account of their knowledge and experience of local government.</p>

3. Wherever practicable, improve confidentiality requirements in relation to the complaints process.

Proposal	Additional provisions in the Act would minimise the ability for people to inappropriately disclose Code of Conduct Panel determination reports or findings prior to them being made public.
Submissions summary	There was general support for this proposal. A number of submissions suggested that the general manager and mayor need to be made aware of determination reports sufficiently in advance to allow the tabling of reports to be scheduled on council meeting agendas. A number of submissions suggested extending the confidentiality requirement to begin when a complaint is lodged.
Government response	<p>The Government will amend the Act to prevent people from disclosing information, documents or records provided to them by the Executive Officer or the Code of Conduct Panel in relation to a complaint unless the information has already been publicly disclosed in a determination report.</p> <p>The general manager and mayor will be permitted to discuss the findings in a determination report with each other for the purposes of setting the agenda for the council meeting where the report will be tabled.</p> <p>The Government considers it impractical and onerous to broaden the confidentiality requirements beyond this to apply to all participants from the time a complaint is lodged.</p>

4. Implement council dispute resolution policies.

Proposal	The local government sector would design and implement an appropriately independent dispute resolution framework capable of resolving a broad range of conduct related disputes.
Submissions summary	There was general support for local council dispute resolution policies. Many submissions raised concerns about the cost to councils of implementing these policies. Some submissions suggested the dispute resolution process should be run by an independent arbiter, as complainants would not see councils as independent in resolving complaints involving their councillors.
Government response	<p>The Government will amend the Act to require councils to adopt dispute resolution policies. Councils will be able to include the option of an independent mediator in their processes.</p> <p>The Government notes that local dispute resolution is likely to be more cost-effective than a Code of Conduct Panel process.</p>

Other issues raised in submissions

Other issues raised	Government response
The available sanctions are either insufficient, or applied inconsistently by the Panel.	Extra sanctions for serious or repeated breaches will be considered as part of the feasibility study for transferring the Code of Conduct process to TasCAT.
Require complaints to be lodged with the Executive Officer of the Panel rather than the general manager to mitigate the general manager's potential conflict of interest.	Not agreed. The general manager's role is limited to procedural and administrative matters associated with the complaint, not assessing its merits. Also, the general manager can delegate this role to a deputy if they believe there is a potential conflict of interest.
Councillors should have access to legal representation in Code of Conduct proceedings, and the rules of evidence should apply.	The Government will consider legal representation as part of the feasibility study in 2022 of transferring Code of Conduct matters to the jurisdiction of the TasCAT. More detail provide above.
Code of Conduct complaints processes are stressful and unfair to councillors and complainants.	The reforms outlined in this response, plus those previously instituted, should improve the fairness and effectiveness of the Code of Conduct process.