

A new conduct regime for local government officials

By Denis McLeod

1. Introduction

Through the operation of recently proclaimed sections of the *Local Government Legislation Amendment Act 2019 (WA)*, several new sections were added to the *Local Government Act 1995 (WA)* (**LG Act**) which impact significantly on control of the conduct of key officials in local government (**LG**).

The new sections added to the LG Act are as follows:

- New s.5.51A relates to a **new code of conduct for employees**; and
- New ss.5.102A, 5.103, 5.104, and 5.105(1A) and (1B) all relate to a **new code of conduct for council members, committee members, and candidates**.

(enabling sections).

The regulations consequential on those enabling sections were all gazetted on 2 February 2021 and came into operation on 3 February. Their effect is explained below

2. Model Code of Conduct Regulations

The most significant feature of the new conduct regulation regime is the coming into operation on 3 February of the *Local Government (Model Code of Conduct) Regulations 2021 (MCC Regulations)*. The MCC Regulations repeal the *Local Government (Rules of Conduct) Regulations 2007 (RC Regulations)*, which had set out in Part 1 some non-enforceable principles to guide the behaviour of council members and set out in Part 2 enforceable rules of conduct for council members (old s.5.104),

The MCC Regulations further confirm that contravention of a local law for conduct of persons at council or committee meetings (standing orders local law) is a minor breach for the purpose of s.5.105(1)(b) of the LG Act (by reg.5) and bring into operation the Model Code of Conduct (**model code**) set out in Schedule 1 of the MCC Regulations.

The code of conduct is applied not only to council members, but also to committee members and candidates (new s.5.103(1) and cl.3 of the model code). Rules of conduct are set out in Division 4 of the model code, which extends the rules of conduct to apply not only to the conduct of council members as previously, but also now to committee members and candidates (new s.5.103(2)(c) and cl.3 of the model code).

3. Content of Model Code

The second significant feature of the new conduct regulation regime is the content of the model code, including the new s.5.103(2), which provides that a code of conduct **must** include general principles to guide behaviour, requirements relating to behaviour and provisions specified to be rules of conduct. The model code in the MCC Regulations complies closely with that obligation, in that the code has as its principal contents:

- general principles to guide behaviour (Division 2; regs.3-6);
- requirements relating to the behaviour of council members, committee members and candidates (Division 3; cl.7-10);
- the mechanism for dealing with alleged breaches (Division 3; cl.11-15); and
- provisions specified to be rules of conduct (Division 4; cl.16-23).

The intent of items (a), (b) and (d) above is consistent with the apparent intent of the repealed RC Regulations, which contained in reg.3 a statement of non-enforceable general principles to guide the behaviour of council members. What is different under the model code is:

- the much greater detailing of the behaviour requirements in Divisions 2 and 3 of the model code compared with the broad behaviour principles of reg.3 in the repealed Rules of Conduct Regulations;
- a change from the aspirational statement of general principles for behaviour in reg.3 of the old Rules of Conduct Regulations to requirements in the sense of behavioural obligations, in the model code; and
- introducing in the model code a clear mechanism to deal with breaches of the behaviour requirements.

The setting out of behaviour requirements as obligations, and the detailing of the mechanisms for dealing with alleged breaches seem to be a bold journey into a new world of close control of the behaviour of council and committee members, and candidates who become council members (reg.15(1)).

The rules of conduct now contained in Division 4 of the model code correspond closely with the rules of conduct in the repealed RC Regulations, and are enforceable in the same way as the old rules of conduct, in that contravention is a minor breach which can be the subject of a complaint to the complaints officer (s.5.107), and referral to a Standards Panel (s.5.110).

The general principles to guide behaviour are set out in Division 2 of the model code, under the general headings 'Personal integrity'; 'Relationship with others'; and 'Accountability'. The general principles in Division 2 appear to be intended as essentially aspirational, though they perhaps provide some general explanatory background for the behaviour requirements set out in Division 3. Division 3 contains provisions setting out the requirements relating to the behaviour of council members, committee members and candidates, and the mechanism for dealing with alleged breaches of those requirements. The requirements are set out in cl.7-10 inclusive under the headings Personal integrity, Relationship with others and Council or committee meetings.

The mechanism for dealing with breaches of the code of conduct is set out in cl.11-15. Cl.11 sets out the provisions for a complaint about an alleged breach, including the provision in cl.11(1) that 'a person may make a complaint ...'. It appears that any person may make a complaint, including a fellow council member; the CEO or other employee of the relevant LG; a representative of the DLGSC; or a member of the public. A complaint must be made in writing in a form approved by the local government, to a person authorised to receive complaints, and importantly, a complaint can only be made **within one**

month after the occurrence of the alleged breach, compared with the six month period for complaints for breach of the rules of conduct (s.5.107(4)).

Cl.12 of the model code sets out procedures for dealing with a behaviour complaint. Amongst other points of significance are the following:

- The LG in making a finding in relation to a behaviour complaint must give the person to whom the complaint relates a reasonable opportunity to be heard (cl.12(2));
- A finding that the alleged breach has occurred must be based on evidence from which it may be concluded that it is more likely that the breach occurred than that it did not occur. (This is the same standard of proof as that in s.5.106 of the LG Act for a finding that a rule of conduct breach has occurred);
- If the LG makes a finding on the complaint, the LG must give the complainant, and the person complained about, written notice of its finding and the reasons for its finding, and its decision as to whether no further action should be taken, or whether to prepare and implement a plan to address the behaviour of the person complained against;
- Such a plan may involve the person the subject of the complaint engaging in mediation, undertaking counselling, undertaking training or taking other action the LG considers appropriate;

Cl.13 sets out the circumstances in which the LG may dismiss a complaint, and the procedure to be followed if a complaint is dismissed. Cl.14 sets out the procedure for withdrawal of a complaint. Cl.15 sets out other provisions about complaints, namely:

- a complaint of an alleged breach by a candidate cannot be dealt with by the LG unless the candidate has been elected as a council member; and
- the procedure for dealing with complaints may be determined by the LG to the extent that it is not provided for in the code.

4. Adoption of a code of conduct by local governments

A third significant feature of the new conduct regulation regime is its method of coming into operation. All LGs are required by s.5.104(1) within three months after 3 February 2021, to prepare and adopt a code of conduct to be observed by council members, committee members and candidates. The code of conduct adopted must incorporate the model code. There is relief from the strictness of that provision in s.5.104(5) which provides that the model code is taken to be a LG's adopted code of conduct until the LG actually adopts a code.

The old s.5.103(1) required every LG to prepare or adopt a code of conduct to be observed by council members, committee members and employees. The new s.5.103(1) provides that regulations must prescribe a model code of conduct for council members, committee members and candidates. The model code does not apply to employees, but it does apply to committee members and candidates, though the complaints provisions will only apply to candidates who ultimately become council members (reg.15(1)).

The code of conduct for employees is now dealt with by s.5.51A of the LG Act and Part 4A of the *Local Government (Administration) Regulations 1996*, as explained further below. The CEO must publish an up-to-date version of a LG's adopted code on the LG's official website (s.5.104(7)).

5. Adoption of additional requirements in code of conduct

The fourth significant feature of the new conduct regulation regime is that it is contemplated that the provision of the model code will not preclude a LG from making additional provisions. The new s.5.104(3) provides that a LG may include in its adopted code of conduct requirements in addition to the requirements referred to in s.5.103(2)(b). Such additional requirements can only be expressed to apply to council or committee members (s.5.104(3)(a)) and are of no effect to the extent that they are inconsistent with the model code (s.5.104(3)(b)).

Subs.(4) of the new s.5.104 provides that a LG cannot include in its adopted code of conduct provisions in addition to the principles referred to in s.5.103(2)(a), or in addition to the rules of conduct. Furthermore, as previously mentioned, cl.15(2) of the model code provides that the procedure for dealing with complaints may be determined by the LG to the extent that it is not provided for in the procedural provisions in Division 3 of the model code.

6. Employee Codes of Conduct

Employee codes of conduct are now dealt with by the new s.5.51A of the LG Act, and a new Part 4A inserted into the Administration Regulations by the *Local Government Regulations Amendment (Employee Code of Conduct) Regulations 2021 (ECC Regulations)*.

Under s.5.51A the CEO must prepare and implement a code of conduct to be observed by employees. The CEO may amend the code and must publish an up-to-date version of the code on the LG's official website. Regulations may prescribe the content of, and other matters in relation to a code. A code of conduct for employees is of no effect to the extent that it is inconsistent with any such regulations.

Part 4A added to the Administration Regulations by reg.4 of the ECC Regulations contains six new regulations, being regs.19AA-19AF. Provisions of note include:

- 19AB provides that a code of conduct must contain a requirement that a LG employee not accept a prohibited gift from an associated person, being a person who is undertaking or seeking to undertake an activity involving a local government discretion or it is reasonable to believe, is intending to undertake an activity involving a local government discretion;
- 19AD contains detailed provisions dealing with employee conflicts of interest (note in this regard the definition of 'interest' in reg.19AA includes an interest arising from kinship, friendship or membership of an association).
- 19AE sets out the matters codes of conduct may deal with.
- 19AF deals with the determination of a threshold amount for a prohibited gift. The CEO determines the threshold amount for a prohibited gift, and the threshold amount may be \$300 or a lesser amount possibly as low as nil.

Concluding comments

- The new conduct regime includes an enforcement process for behaviour breaches, as well as continuing provisions for breaches of rules of conduct. As for breaches of rules of conduct, apart from its extension to committee members and candidates, the new regime makes minimal changes to the previously existing Rules of Conduct, and the established breach process through the operation of the Standards Panels.

- The significant innovation in the new conduct regime is the inclusion in the model code of an enforcement process for behaviour breaches by council and committee members, and by candidates who are elected (code cl.15(1)). The early code of conduct provisions introduced in the LG Act 1995 in s.103 may have seemed a positive step, but though council members or others might have been concerned about inappropriate behaviour by a particular council member, there was little they could effectively do. The Rules of Conduct Regulations in 2007 introduced, through external Standards Panels, a mechanism for dealing with the more serious conduct breaches, and the aspirational behaviour principles in reg.3 showed at least an awareness of the broader behaviour issues left to be dealt with under individual codes of conduct, but without any enforcement mechanism at that time.
- The expanded behaviour principles guidelines in Division 2 of the model code, and in Division 3 the behaviour **requirements**, and the **mechanism** for dealing with alleged breaches of the requirements, gives the code of conduct principles the teeth that they previously lacked.
- Although for some, the new model code requirements and breach mechanisms may seem an additional encumbrance on what is already a heavily regulated sector, it will remain a challenge for LGs to make the new regime work, and perhaps to expand the mechanism provisions by providing for enforcement processes for behaviour breaches that are effective, and comply with the requirements of due process.
- More thought on process and perhaps additional procedures may need to be added by LGs to what is in Division 3 of the code presently, but that no doubt will follow, especially if complaints are received and mechanisms are tested.
- The immediate task for LGs is to adopt their own codes of conduct for council members, committee members and candidates, either in the form of the model code, or with permissible modifications. Attention is likely to focus especially on the mechanisms, and any personnel required, for the investigation and determination of complaints.
- As for the code of conduct provisions for employees, a feature of these provisions is that the responsibility for preparation, implementation and amendment of the code for employees is assigned to the CEO.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Denis McLeod by telephone to 9424 6201 or email to dmcleod@mcleods.com.au.

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