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2024 - Celebrating 30 years of Caring for Ku-ring-gai

FRIENDS OF
KU-RING-GAI
ENVIRONMENT INC.

NSW Office of Local Government
Locked Bag 3015
NOWRA NSW 2541

28 November 2024

Dear Sir/Madam

RE: Councillor conduct and meeting practises review.

We thank you for the opportunity to make comments on the proposed changes to the Code of Conduct and Meeting Practises. We understand that submissions will be accepted until 29 November 2024.

Friends of Ku-ring-gai Environment Inc (FOKE) is a community group dedicated to protecting and conserving the built and natural environment of the Ku-ring-gai local government area in northern Sydney. FOKE was established in 1994 and celebrates its 30th Anniversary this year.

In the preparation of our response, we have liaised and worked in conjunction with the Better Planning Network to form the views expressed below:

A What are the principles of change – is anything missing?

1. We agree with the seven principles of change proposed.
2. However, the obligations and responsibilities as detailed in the current principles in the Model Code of Conduct should not be in any way diminished by the proposed changes.
3. There should be an additional principle – that there is a **right to be heard** for the general public at council meetings that is enshrined in legislation as well as the Code.
4. There should be a further additional principle – a **duty of respect** to council and community.
5. Where a decision regarding conduct that is not concerning pecuniary/non-pecuniary interests is disputed, there must be an access pathway to NCAT or other appropriate body available for complainants for other breaches of the Code.
6. We agree the Oath of Office for local councillors should be aligned to the Code of Conduct.

Potential changes to the code of conduct and oath of office – what are the key elements?

1. We do not agree with the code of conduct being 'aspirational' – the principles must be mandatory and enforceable, otherwise penalties will be difficult to apply even through tribunals.
2. We do not agree with the implication that current Code of Conduct is inherently not easy to understand. It is quite a simple document. If councillors are unable to understand such a basic document, they will not be able to grasp complex legislation that they must turn their minds to from time to time.
3. While it is agreed that the Code could be separated into pecuniary/non-pecuniary interests and other conduct issues, it is not clear how separating the behavioural expectations of councillors from the definitions of misbehaviour reflects a "positive approach".
4. There are sections within the proposed Code that deal with issues relating to the Code of Meeting practice. If that Code is proposed for change it must be publicly exhibited for comment.
5. As above, a key element should be that there is a right to be heard for the community.

Potential changes to the definitions and assessment of councillor misbehaviour – Pecuniary interests:

1. The proposed pecuniary interest framework is reasonably appropriate.

2. However, the proposed amount of any penalty infringement notice needs to be clarified. If it is a small amount, it may not encourage compliance or persuade councillors to provide information when requested by OLG.
3. The current code also includes close friends, which is now missing from the proposed framework. Close friends should be included.
4.The current "appropriate management" of pecuniary and non-pecuniary interests is insufficient to encourage councillors abide by the Code – if a conflict is not declared and managed prior to a vote, even if conflict is later declared or a complaint lodged, the vote still stands. This can encourage councillors to declare conflicts after a vote. If a failure to declare a conflict is upheld, the vote should be voided and retaken.
5. The definition of "other body" should be explained to include where councillors have, for instance, been on a committee of an association for an extended period.
6. Because Local Planning Panel members are selected by councillors, the code of conduct in relation to pecuniary interests should also apply to LPP members.

Non-pecuniary interests:

1.We agree in general with the principles that constitute non-pecuniary interest.
2.However again, the current framework for "appropriate management" is insufficient to discourage non-disclosure prior to a vote.
3.While membership of an association should not automatically be seen as a conflict, it is agreed that if there is a direct advantage to an individual or organisation, that must be publicly declared. Again, sufficient penalties and voiding of a vote are a necessary deterrent to non-disclosure.
4.The methods of "management" of significant or major non-pecuniary interests must be clearly spelled out, particularly with regard to whether a councillor can stay for, debate and/or vote on an item. While those boundaries are not clearly delineated, some councillors may stay while others may remove themselves from a debate. It cannot be left to the subjective opinion of individual councillors, it must be cleared prescribed.

Property developers and real estate agents – specific features to address concerns

1. There must be a penalty for matters of pecuniary or conflicts of interest that councillors do not declare e.g. divesting of real estate or development business activities and contractual obligations. Councillors must not be allowed to put real estate business interests into the wife's name or that of his/her family or trust
2. The Code does not appear to take into account affiliations which they currently have to declare. Declarations must be mandatory.
3. Who will be monitoring whether councillors who are currently property developers and/or real estate agents are complying with the Code? Currently the Code is self-monitoring, which is inadequate.
4. In the case of penalties and disqualification, where councillors breach the Code what will the terms of disqualification be e.g. length of time?
5. The term "own property" must be clarified. If a councillor owns more than one property in their own name and that is rented out, will that be considered to be a real estate business arrangement? If this is not adequately clarified, it will create a loophole in the legislation.

Councillor misbehaviour in public office – appropriate thresholds and complaint minimisation

1. We do not agree that a panel of mayors and ex-mayors should judge their fellow councillors. An interested and informed observer could consider that councillors from the same political party would be less inclined to sanction their fellow party members. Even the findings of parliamentary inquiries are often seen to be split along party lines.
2. The Privileges Committee should be staffed by a rotation of lawyers who have a clear understanding of the proposed new legislation with regard to councillor misconduct.
3. The threshold for councillor misbehaviour must also include bullying, harassment, discrimination, fairness and equity, which are all considered to be misbehaviour under the current Model Code of Conduct.
4. While it is agreed that councillors should have freedom of speech, social media accounts can and have been used inappropriately to bully and harass others because councillor social media accounts are administered by the councillors themselves. The use of social media must be addressed in the thresholds.

Addressing inappropriate lobbying – key features

1. We agree with the proposed lobbying guidelines, but more obligations are required.
2. The Code needs a definition of 'professional lobbyist'.

3. There needs to be a requirement that all meetings of mayors, councillors and senior staff of council with professional lobbyists are diarised and minuted for the public record.
4. The Code needs to expand to include financial gain from changes to zoning in an LEP.
5. Community groups should not be considered as professional lobbyists.
6. A local resident and/or local community groups calling or writing a submission on a council policy or plan could be considered a lobbyist if this is not clarified.

B. Dispute resolution and penalty framework

1. Reducing the number of complaints must not be an objective of the changes. Only vexatious complaints need to be reduced.
2. We do not agree that there should be "no investigations of misbehaviour". Racial discrimination for instance can have devastating consequences for the recipient particularly via social media which can incite violence. It is unacceptable to suggest that only pecuniary and non-pecuniary interests are serious misconduct.
3.Where the Privileges Committee considers misbehaviour to be serious enough to risk the health, safety and/or wellbeing of others, there should be the ability for the Committee to refer the councillor to OLG for significant sanctions.
4. Mayoral and Councillors' social media must be administered by the Council, so that council has the ability to remove a post or sanction councillors who breach the Code.

Abolishing the two step process

1. The length of time for OLG to deal with complaints should be indicated.
2. We agree that private investigators, who are often just trained mediators, should have no future role.
3. However, there must still be a pathway for serious misbehaviour to be considered by OLG or NCAT. Concerns regarding having to satisfy evidentiary standards should not preclude investigation of serious misbehaviour.

Giving OLG the power to issue penalty infringement notices – what level is appropriate?

1. The PIN should be sufficient to encourage compliance, say $300-$500. A second offence should incur a higher PIN and so on. There must be a limit to the number of PINs that can be accrued by a councillor within the term of a council beyond which more serious sanctions can be applied.

NSW Local Government Privileges Committee – are proposed penalties appropriate?

1. The Privileges Committee should be made up of lawyers on rotation not ex mayors, to ensure an independent process with no actual or perceived political bias.
2. The use of lawyers will also ensure that should the matter be serious enough, the lawyer's brief can be used at an appropriate tribunal or body with little or no further work from OLG.
3. It is inappropriate to delegate the power to dismiss certain matters to a Secretariat that has no formal or legal training.
4. Remuneration of the Privileges Committee cannot come directly from the council of the councillor in question. That could be seen to cause bias. A general levy across all councils should be applied. Where councils have a significantly higher proportion of complaints, then the levy should be increased.
5.Information needs to be provided as to how often the Privileges Committee will sit. Would it be on a case-by-case basis or on set dates?
6. The potential loss of sitting fees should not be restricted to misbehaviour in a council meeting. Such penalties should be able to be applied for all serious instances of misbehaviour.
7. A pathway for referral to an appropriate tribunal or body for more serious sanctions must be available.
8. The term "disallowance" must be clarified. The appropriate tribunal or body must have the power to disqualify a councillor from standing for council for up to a set period, say five years.

Referral of significant sanctions to appropriate tribunal or body

1. Significant sanctions should only be made by a formal tribunal.
2. If a matter is referred to a Tribunal and a resident has made the complaint there may be a situation that the resident may not have the financial capacity to be represented at the Tribunal to give evidence against that Mayor or councillor.
3. Will it be OLG that acts in a tribunal, rather than the complainant?
4. Will the complainant have their legal costs covered if they are required to be a witness at a Tribunal hearing?

5. Will there be protection for people who make a complaint to ensure they will not be sued for defamation? It is usual that most Code of Conduct complaints are made by residents and are kept confidential to avoid defamation.
6. The existing sanctions may not be sufficient in cases of serious misconduct. It should be legislated that OLG has the power to refer serious misconduct to the police and/or ICAC depending upon the decision of the tribunal.

C Restoring dignity to council meetings

5. Code of Conduct and Meeting Practice must ensure residents have the right to speak on a matter before council. Speakers should not be unduly restricted to just one for and one against a council agenda matter. Mayors must not have the right to select speakers – the selections could potentially be biased towards a particular viewpoint.
6. Residents must not be denied the right to free speech providing it is not defamatory.
7. Residents are not public officers of the council and are unelected so therefore should not be subject to Penalty Infringement Notices. The use of PINs could be abused by a Mayor or council to ensure a member of the public is not entitled to free speech and submitting comments to council.
8.A resolution of the council should be made before any action is taken unilaterally by a Mayor. Security is usually available at council meetings and is usually sufficient to ensure acts of disorder are appropriately dealt with.
9. Councillors or residents attending a council meeting exhibiting disorderly conduct should be given a warning prior to expelling a councillor or resident from a meeting.
10. All council meetings should be required to be audio visually recorded and archived in the interest of accountability and transparency.
11. Councillors should not drink alcohol before or during meetings and should be ejected by resolution of council for intoxicated behaviour.
12. The term “acts of disorder” must be clarified, otherwise the ability of Mayors to eject councillors could be used to stifle debate or alter a voting pattern.
13. A councillors right of review for acts of disorder is not clear. Who will review the matter when the Mayor is the ultimate authority in a council meeting? Will it be an external review? If so, by whom?
14. The proposed reforms to the Model Code of Meeting Practice must be exhibited for comment, just as the Code of Conduct has been exhibited.
15. It is unreasonable to expect councillors to stand every time they speak. It can also cause difficulties with video recordings needing constant monitoring of the camera angle.
16. It is also an anachronism for councillors and/or members of the public to stand when the Mayor enters the chamber. Mayors are not judges. While the dignity of council meetings is important, they should not feel like a court room.

Banning Briefing Sessions

1. We agree all staff briefings with councillors behind closed doors should be banned in the interests of transparency, unless the matter pertains to matters of legal or commercial in confidence. All other information provided to councillors must be made publicly available. However, the definition of “legal” should be clarified as it is applied too freely.
2. As committee meetings are not public meetings in many councils, staff information must only be provided in council meetings ie as part of the Business Papers. This will also ensure that all councillors will have access to all information provided by staff, rather than some councillors not being party to all information if they are unable to attend closed briefing sessions.
3. We agree the briefing restrictions on discussions between the General Manager and the Mayor only should not be included. However, it is suggested for transparency, that a record of each meeting be kept that lists the topics discussed without going into detail.
4. A further measure to improve transparency relates to Local and District Planning Panel hearings. Currently once the public and the applicant have spoken, the Panel retires behind closed doors where council staff can attend to assist in deliberations. Similarly, the Panels are able to now have behind closed doors briefing sessions with proponents and council staff prior to a Panel hearing. Both of these scenarios prevent the public from hearing what the decision makers (the Panel) are being told by the proponent and by council staff. This increases the risk of corruption and does not promote transparency. The pre and post meeting hearings must be open to the public.
5. All councils must be required to immediately commence audio/visual recording of council meetings and publish them on their website. There are several metropolitan councils that still do not do visual recordings of council meetings and/or only make recordings available under a GIPA application.
6. The period that recordings will be made available on councils' websites should be enumerated.

We look forward to the analysis and changes that the Office of Local Government recommend in finalising the necessary draft legislation, regulation and materials for the implementation of the revised model.

Yours faithfully

Kathy Cowley

Kathy Cowley
PRESDENT
cc. Member for Davidson Matt Cross MP
cc Member for Wahroonga the Hon Alister Henksens SC MP
cc Member for Bradfield the Hon Paul Fletcher MP
cc Mayor and Councillors Ku-ring-gai Council