

Submission to the Office of Local Government on the Review of the Model Code of Conduct for Local Councils in NSW

December 2016

Table of contents

Introduction	3
Purpose	3
Background	3
Key Issues with the Code and Procedures	4
Suggested Improvements for the Code and Procedures	4
Key Principles that should underpin the Code	4
General Conduct Obligations	5
Model for Managing Complaints	5
Quality of Conduct Reviewers	6
Use of Data to Inform Further Policy Development	6
Relationship to Other Legislation	6
Support and Enforcement of the Code	7
Support Tools	7
Enforcement and Sanctions	7

Introduction

Local Government NSW (LGNSW) is the peak body for councils in NSW, representing NSW general-purpose councils, associate members including special-purpose county councils, and the NSW Aboriginal Land Council. In essence, LGNSW is the organisation for all things local government in NSW. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW thanks the Office of Local Government (OLG) for the opportunity to provide a submission concerning the review of the *Model Code of Conduct for Local Councils in NSW* (“Code”) and the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* (“Procedures”).

Purpose

This submission is in response to the OLG’s request for input into the review of the Code and Procedures, made via Circular No. 16-42. Feedback was requested on:

- the ethical standards prescribed under the Code;
- the operation of the Procedures; and
- requirements for the disclosure of interests by councillors and designated persons in returns of interests currently submitted under section 449 of the Local Government Act 1993 (“Act”).

Background

Local Government NSW (LGNSW) believes that it is essential to have a strong and effective system in place for ensuring the ethical conduct of councillors. Such a system supports the operation of the sector overall, and importantly, ensures sector credibility and community confidence. All components of this system need to work well, from the Code itself, through to training, implementation and enforcement.

The Code as it currently stands has been evolved over time, each time improving its workability. There is still room for improvement, however, to ensure that the Code and Procedures are as effective and supportive as possible.

LGNSW has consulted with the sector about the Code and Procedures in preparing this submission, and included the feedback provided. Also included with the submission is the final report of some research commissioned by LGNSW in 2015 from Dr Tim Robinson about opportunities to improve the code and its operation.

The submission identifies the key issues associated with the Code and Procedures, and then makes suggestions about the principles that should underpin the Code, the preferred model for managing complaints, the quality of conduct reviewers, the need for systematic data collection about complaints and their resolution, the relationship of the Code to other legislation, tools that should be used to support the Code, and the need for timely and effective enforcement of the Code.

The submission should be read in conjunction with the Tim Robinson report.

Key Issues with the Code and Procedures

The following are the key issues associated with the operation of the Code and Procedures:

- The Code is very general and some of the conduct standards are not well defined, which can lead to misinterpretation and misuse in complaints.
- The complaint assessment and investigation process is not sufficiently independent.
- It is inappropriate for mayors and general managers to be involved in complaints management. In particular, it is unreasonable to expect that the general manager should have a role in managing the misconduct of councillors or mayors. It creates unnecessary conflict between the general manager and the council and places them in an invidious position where they can be subject to undue influence. Several general managers have been terminated following code of conduct complaints, especially where the complaints have occurred in an election year. Public Interest Disclosure protections are not afforded to general managers and this places them in a very vulnerable position. Greater protection needs to be given to general managers to be able to confidently raise inappropriate conduct or misconduct without fear of being dismissed as a result.
- Anonymous complaints can be from vexatious complainants, with no accountability. Despite the addition of Part 8 of the Code, it is still used as a political weapon in some circumstances, either against councillors/mayors or against the general manager.
- The capability of conduct reviewers is highly variable and reviewers can sometimes have a vested interest in the investigation.
- It takes far too long to resolve complaints. The response capability of OLG is insufficient, and multiple complaints have taken several years to be finalised. This has a highly damaging impact on the individuals involved and on the council and wider sector's reputation and credibility.
- Transparency in the outcome of complaints investigations and recommendations is limited.
- There appears to be a reluctance to apply appropriate sanctions.
- Minor sanctions (eg a requirement to make an apology) seem to be ignored with no consequences.

Suggested Improvements for the Code and Procedures

Key Principles that should underpin the Code

- Greater clarity and consistency of meaning should be achieved within the Code and in its application in practice.
- Complaints made under the Code in relation to staff should be managed by the general manager.

- An option for councils to resolve a complaint relating to councillors internally, if it is possible to do so, should be retained. Where it is not possible to do so within 30 days then the complaint should be referred to an independent third party for investigation.
- Investigators should be truly independent of the parties to the complaint and there should be improved standards for conduct reviewers.
- Investigations and any subsequent application of sanctions should be undertaken within statutory time limits of 90 days from the date of referral to ensure appropriate and timely resolution of complaints.
- Outcomes of investigations should be made transparent to the public, and compliance with any sanctions applied should be compulsory.

General Conduct Obligations

- The general conduct obligations are too general and should be clarified, perhaps through the inclusion of definitions and the use of examples.
- Better clarity could also be provided throughout the rest of the code through worked scenarios, as occurs in many government codes of conduct.
- The use of social media should be added into the general conduct obligations, in terms of the expectation that councillors will not use their private social media accounts to undermine the decisions or actions of council.

Model for Managing Complaints

- A template for submitting complaints should be developed for use as a way of ensuring that consistent and complete information is captured at the time of the complaint being lodged. The template could include what (ie what is the allegation being made), who (who is the complaint by, who is it being made against, and who else was present at the time when the alleged breach occurred), when (date and time of the alleged breach), where (eg during a council meeting etc), and all available evidence to support the complaint (such as copies of meeting minutes, a link to a council meeting webcast, etc).
- Complaints made under the Code in relation to staff should be managed by the general manager only.
- An option for councils to resolve a complaint relating to councillors internally, if it is possible to do so, should be retained.
- It may be possible for this to be done by an internal ombudsman. This person could be shared between a number of councils as a way of having a sufficiently skilled person who is genuinely independent. This model is already used by Burwood Council and works quite well, avoiding full external reviews wherever possible.
- However, it is recognised that the capacity for councils to make good decisions about conduct are constrained by the politics of the environment.

- Where it is not possible to resolve a complaint internally within 30 days then the complaint should be referred to an independent third party for investigation (ie not OLG). The general manager should not be involved in attempting to resolve these complaints.
- Investigators should be truly independent of the parties to the complaint and there should be improved standards for conduct reviewers.
- Conduct investigators could be managed through a panel of experts are assessed as meeting the required competency standards.
- Investigations should be undertaken and resolved within statutory time limits of 90 days from the date of referral to ensure appropriate and timely resolution of complaints.
- Outcomes of investigations should be made transparent to the public, and compliance with any sanctions applied should be compulsory.
- The Code itself should include a section on how complaints are to be reported. Part 8 talks about what must not be done in relation to a complaint, but the options for making a complaint are not identified. Part 8 therefore lacks context.

Quality of Conduct Reviewers

- Conduct reviewers or investigators should be required to attain a relevant qualification or competency standard.
- The preferred model would be for a pre-qualified panel of independent investigators to be established to ensure consistency of approach and outcome.
- Conduct reviewers must also be required to declare conflicts of interest in relation to the complaints. This is particularly important in rural areas, where it is possible or likely for the conduct reviewer to have some type of relationship with the complainant.
- A declaration of conflict of interest should in fact apply to all persons involved in investigating or resolving the complaint.

Use of Data to Inform Further Policy Development

- The returns required from councils could and should be used to inform changes to the Code and Procedures, as well as to inform the need for additional support within the sector or amendments to the regulatory framework more generally.
- However, it would be useful to collect additional information about the complaints, such as the provision under which the complaint was made, the time taken for the complaint to be resolved, and whether the subject of the complaint complied with any sanctions. This would assist in assessing effectiveness of the code and its enforcement, as well as providing information on the issues upon which councillors may need additional support.

Relationship to Other Legislation

- Some clarification is required in relation to code of conduct matters between councillors and staff, particularly in relation to allegations of bullying and harassment.

- General managers have a duty under the *Work Health and Safety Act 2011* to provide a safe working environment for staff. Councils have robust procedures in place to deal with allegations of bullying among staff, but allegations of bullying by a councillor are a lot more challenging.
- Many councillors believe that the *Work Health and Safety Act* does not apply to them, due to the exclusion of “an elected member of a local authority acting in that capacity” in the definition of an “officer” (s4). However, this exclusion does not apply to the general duty of care imposed by section 29. Councillors are therefore captured under the Act.
- It would be of assistance if the code could be clearer about the manner in which bullying and harassment issues (or other work health safety issues) involving councillors should be managed, as there is a clear overlap in the two regulatory frameworks. It is suggested that the code should be used in the first instance where possible, so that the general manager is not placed in the position of having to manage a WHS complaint with a councillor. It is also more appropriate that OLG or NCAT should be responsible for applying sanctions than SafeWork NSW.
- Explicit recognition of this in the code would assist the whole sector in understanding the relationship between the two frameworks, but would also ensure that the general manager can demonstrate they are taking all reasonable steps in providing a safe workplace for their employees.

Support and Enforcement of the Code

Support Tools

- Frequently Asked Questions associated with the Code and Procedures would be helpful to councillors and staff. It is suggested that OLG could maintain the FAQs and progressively build upon them following enquiries about operation of the Code.
- Similarly, it would be useful to provide worked examples or scenarios in the Code, such as are used in many State Government agency codes of conduct.
- LGNSW has an e-learning module that could be promoted by OLG as a way of supporting the code.
- The code should also be linked to the capability framework that is being developed.

Enforcement and Sanctions

- Proper and timely enforcement of the Code is essential to its success.
- Investigations undertaken by OLG to date have taken far too long, and need to be resolved much more quickly in future. Use of an independent panel of expert investigators could assist in this respect, with recommendations made to OLG or NCAT about suggested sanctions.
- Part 8 Maintaining the Integrity of the Code should also be used more often to deal with complaints made for an improper purpose.

- Paired with timeliness, there has to be a willingness to apply sanctions for breaches of the Code. Amendments were made to the *Local Government Act 1993* last year to provide a broader range of tools for responding to misconduct or inappropriate conduct, but these tools have not been widely used, and there is a perception within the sector that both OLG and NCAT are unwilling to use them, or are unwilling to apply sanctions that are sufficiently commensurate with the breach.
- LGNSW supports the use of small (commensurate) sanctions for minor breaches, but compliance with these must be mandatory.
- OLG also needs to monitor compliance with sanctions to ensure they are meaningful.
- Where financial penalties are applied, consideration should be given to pairing them with suspension of the relevant councillor.

Exploring Opportunities to Improve the NSW Local Government Model Code of Conduct and its Operation – A LGNSW Initiative

Final Report

Dr Tim Robinson

2 August 2015

Contents

Executive Summary.....	4
Introduction	6
Evolution of the Code of Conduct.....	7
Complaint Trends.....	8
The Research Project	9
Common Themes	9
Overall Issues	10
Source of Challenging Complaints – Strongly Agreed.....	10
Problem a Minority of Councillors – Strongly Agreed	10
Further Specification Not the Answer – Strongly Agreed.....	10
Positive Impact of the New Model Code - Agreed.....	10
Conduct Standards.....	10
Breadth of General Conduct Standards 3.1 to 3.3 – Agreed	11
Matters of Interpretation - Agreed.....	11
Administration of the Code.....	12
Insufficient Independence – Strongly Agreed.....	12
Inappropriate Mayoral Role – Strongly Agreed	13
Varying Quality of External Conduct Reviewers – Strongly agreed	13
Role of OLG – Strongly Agreed.....	13
Incommensurate Punitive Consequences – Strongly Agreed.....	14
One-off Issues	14
Complaints by the General Manager about Elected Representatives.....	14
Sector-wide Database	14
Variable Transparency	15
Lessons from other Jurisdictions	15
South Australia.....	15
Queensland	16
Victoria.....	17
Suggested Improvements	18
Independence	18
Sanctions.....	19
Clarity and Consistency.....	19
Expertise.....	19

Timeliness	20
Conclusion.....	20
Recommendations	21
Strengthened Independence of Assessment and Investigation Regime	21
More Sanction Options More Commensurately Applied	21
Clarity and Consistency of Meaning and its Application in Practice.....	21
Improved Standards for Conduct Reviewers	21
Improved Timeliness of Response from OLG.....	21

Executive Summary

In recent times various elected members in NSW local government have provided some critical commentary to LGNSW about the Model Code of Conduct and its application. This commentary, some of which was reinforced in discussions at a LGNSW Mayor's Weekend Seminar in early May 2015, initiated this research project. The aim of the project was to identify whether there were any broad-based issues impacting on the efficacy of the Model Code especially as it impacted elected members, and to suggest options for improvement.

The main method for collecting information was interviewing around a dozen individuals from the NSW local government sector with experience in aspects of the Model Code. This included mayors, councillors, general managers, senior staff, complaint coordinators and conduct reviewers. The sample was one of convenience and the research results, while valid in terms of suggesting the cause of problems, would need further validation to conclude causal factors with certainty. The interviews were conducted with a promise of anonymity to encourage the expression of frank views about issues.

The interviews did identify some common themes causing concern about the Model Code and its application. The context for the concerns expressed was strong agreement that the main problem centred upon councillor to councillor complaints and to a lesser extent to complaints between councillors and general managers. It was acknowledged that only a small minority of councillors were involved in such matters which tended to have the potential for high levels of reputational damage to the council and individuals involved. The common issues raised were:

- a. undue breadth and generality of the general conduct standards in section 3.1 to 3.3 of the Model Code
- b. too many phrases and concepts in the Model Code open to intentional or unintentional misinterpretation
- c. insufficient independence of the complaint assessment and investigation process
- d. an inappropriate role for the mayor in matters of complaint management
- e. varying quality of conduct reviewers
- f. role of OLG, especially their inadequate response capability and,
- g. an inadequate range of sanctions incommensurately applied.

The management of code of conduct complaints in three other Australian jurisdictions was investigated with a view to informing suggested improvements to the NSW Model Code. The Victorian approach for dealing with councillor to councillor matters under their code of conduct offered some interesting ideas as matters are dealt with by an independent panel operating at arms-length from the council. The complainant councillor is required to present his/her case to the panel, which is empowered to hear evidence, make findings and impose penalties. Other than administrative support to the panel, no council officer has a decision-making role in complaints by one councillor against another.

The participants in this research project also identified suggested improvements to the Model Code and its operation. These concentrated upon the key problem area of a small minority of councillor to councillor matters. Improvements were identified in five key areas. These were:

- a. strengthened independence of the assessment and investigation regime
- b. more sanction options more commensurately applied
- c. greater clarity and consistency of meaning and its application in practice
- d. improved standards for conduct reviewers, and
- e. improved timeliness of response from OLG.

The report makes recommendations in relation to each of these areas of improvement. The recommendations are:

Strengthened Independence of Assessment and Investigation Regime

That LGNSW further investigates and considers the Victorian approach for dealing with councillor to councillor complaints and whether its application in the NSW jurisdiction in similar circumstances, including councillor to general manager complaints, is worthwhile in light of the issues raised in this research report.

More Sanction Options More Commensurately Applied

LGNSW consider developing a more comprehensive report on sanctions in four respects:

1. the types of sanctions that should be available to apply when a breach of the Model Code by a councillor is determined
2. the circumstances in which such sanctions should be applied
3. the possibility of a form of individual performance order to enforce certain sanctions (for example apologies, counselling and training), and
4. what person or body should have the authority to apply the sanctions and what sanctions should be applied automatically.

Clarity and Consistency of Meaning and its Application in Practice

LGNSW initiate a project, possibly in conjunction with the OLG, to develop material in support of the Model Code and its procedures which assists in building a sector-wide understanding of key terms and concepts and the application of these in practice.

Improved Standards for Conduct Reviewers

OLG be requested to review the requirements for conduct reviewers with the aim of developing a more robust and specific set of standards that permit appointment to the role based on clearly stated competencies, skills and experience.

Improved Timeliness of Response from OLG

That OLG be provided with the feedback from this report concerning the inadequate response of the Investigation and Performance Division and their commitment sought to address process and resource issues so that an appropriate response capability can be provided.

Introduction

LGNSW received feedback from a number of elected members expressing frustration about aspects of the NSW Local Government Model Code of Conduct (the Model Code) and its administration, particularly as it impacted on and between councillors and, to a lesser extent, general managers. This reported frustration included issues such as inadequately defined terms in the Code, the perceived inefficiency and expense of the complaint assessment, investigation and/or resolution process and the lack, or incommensurate nature of, remedial and punitive consequences when breaches were found to have occurred. The point was also made that this perceived lack of efficacy of the Model Code tended to bring about negative repercussions in the public arena, potentially eroding public confidence both in the particular council dealing with the issues and the local government sector more broadly.

In response to this feedback LGNSW commissioned some preliminary research to identify whether there were any broad-based issues impacting on the efficacy of the Model Code and to suggest options for improvement. The main task of the research project was to interview around a dozen individuals from the local government sector with experience in one or more aspect of the Model Code. To obtain a range of views, this group included elected members, senior council staff, complaint coordinators and conduct reviewers. To inform consideration of improvement options, officers from three other local government associations (Victoria, South Australia and Queensland) were asked about code of conduct regimes in their respective jurisdictions.

It was originally intended to conduct a reasonably detailed analysis of NSW Local Government Code of Conduct complaints in order to provide an empirical context for the experiences reported by those interviewed. However the NSW Office of Local Government (OLG) was reluctant to provide data beyond what was ordinarily reported publicly. This has significantly curtailed the usefulness of any data analysis given the largely generic nature of the information in the public arena.

The research undertaken focused on identifying key themes raised across the group of those interviewed. Some individuals raised one-off issues arising from their particular experience with the Code. As they may well be important issues in their own right, they have been included in this report.

This report is structured as follows. The next two sections provide some background about the current Model Code of Conduct and the overall context of Code of Conduct complaint trends. This is followed by a more detailed description of the approach taken in the research project.

The common themes about the causes of problems with the Model Code and its procedures are then described. This is supplemented by a brief description of a few one-off issues raised by research participants. The code of conduct systems in South Australia, Queensland and Victoria are then described, with a number of the more relevant features highlighted. The report concludes with some general comments which provide overall context for the recommendations made.

I would like to thank those individuals who participated in this research project. They gave their time and views generously and for some, it was not easy re-visiting their experiences.

Evolution of the Code of Conduct

A review of codes of conduct applicable to the NSW local government sector over the last twenty-two years reveals a progressively more complex, comprehensive and prescribed approach. In 1993, when the new Local Government Act came into force, replacing the 1919 Act, councils were required to have a code of conduct, largely of their own making. The Act provided for the Minister for Local Government to issue a voluntary model code and the regulations were empowered to prescribe provisions although did not do so. This remained the situation until 2005.

In 2004, the Local Government Amendment (Discipline) Act No 73 was enacted, bringing into force a range of provisions relating to the discipline of councillors, council staff and others. This change resulted in the first Model Code of Conduct being created in 2005 and subject to mandatory adoption by councils. The Model Code of Conduct set out conduct standards in quite a wide range of areas including interactions between staff and councillors, misuse of council resources and conflicts of interest.

In 2008 a second Model Code of Conduct was issued under the relevant statutory provisions of the Local Government Act 1993. The new Model Code was made up of three parts; *Context* (including definitions and principles), *Standards of Conduct* and *Procedures*. Of particular importance in this version was the change in responsibilities for mayors and general managers, who were no longer permitted to sit on conduct review committees (a feature of the 2005 Model Code), but nonetheless retained the primary complaint assessment role.

In 2011 the Minister for Local Government requested the then Division of Local Government to review the Model Code of Conduct. This review resulted in a third Model Code coming into force on 1 March 2013. The Division of Local Government stated that the new 2013 Model Code¹ would give:

...councils greater flexibility to resolve less serious matters informally. It is also providing for stronger penalties to help deter ongoing disruptive behaviour and serious misconduct. The new code is designed to introduce greater fairness. The investigation of all complaints about councillors and general managers is now managed from start to finish by an independent conduct reviewer. New standards have been included to address misuse of the code. Minor changes have also been made to standards previously covered by the code. Clearer procedures have been introduced to help make the code easier to understand and use. The Division has more options to directly manage administration of the code and address its misuse. Both the Division and the Pecuniary Interest and Disciplinary Tribunal will be able to impose stronger penalties for repeated misconduct.(DLG 2013).

The 2013 Model Code is made up of two documents. The first document is the *Model Code of Conduct for Local Councils in NSW*. It sets out the required standards of conduct expected of council officials. The second document is the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW*. It prescribes how complaints under the Code are to be managed.

¹ NSW Division of Local Government, New Model Code 2013 – [Key Messages](http://www.olg.nsw.gov.au/sites/default/files/Model-Code-of-Conduct-Key-Messages.pdf), <http://www.olg.nsw.gov.au/sites/default/files/Model-Code-of-Conduct-Key-Messages.pdf> accessed 3 July 2015.

The 2013 Model Code remains in force currently and is the one subject to the concerns initiating this preliminary research project.

Complaint Trends

The NSW OLG, in its most recent publication on the performance of NSW councils², included some high-level data on Code of Conduct complaint trends. It also published a listing of all NSW councils with key information about the operation and financial position of each council for the financial years 2012, 2013 and 2014. This information set is similar to that published in the former comparative information publications. Amongst the information published, is data for the 2013 and 2014 complaint reporting years³ (1 September to 31 August) about the number of code of conduct complaints received by each council in the subject year, the cost in that year of dealing with code of conduct complaints and the number of complaints resulting in a finding of a breach.

In summary, the OLG provided the following high-level data and key points:

	2014	2013	Difference
Total no of complaints	322	296	9%
No of councils that received a complaint	88	76	16%
No of complaints finalised in reporting period	291	311	-6%
Total cost of dealing with complaints	\$1,177,702	\$745,988	58%

- Over 50% of councils received at least one code of conduct complaint
- 66% of all complaints were made to 24 councils
- The 20 councils with the greatest costs contributed to 69% of the costs incurred by all councils
- Where an investigation identified a breach, most were found to be a breach of the general conduct provisions
- Most recommendations made by a conduct reviewer or conduct review committee required the subject person to apologise to any person or organisation affected by the breach or be counselled for their conduct
- The Code of Conduct reporting period was 1 September 2013 to 31 August 2014 and includes County Councils.

Box 1 – Code of Conduct Complaint Data 2013 and 2014. Source - NSW OLG, Your Council June 2015: Profile and Performance of the NSW Local Government Sector 2013/2014, p35, 2015.

In the text accompanying the data the observation was made that a major driver of complaint numbers was political in-fighting and interpersonal conflict. The presentation of the data infers a legitimate trend, but with only two years of reporting, it is too early to draw conclusions.

² NSW OLG, Your Council June 2015: Profile and Performance of the NSW Local Government Sector 2013/2014, 2015.

³ There are only two years so far that OLG has collected sector-wide Code of Conduct complaint data.

The Research Project

The aim of the research project was to identify whether there were any common themes in the issues seen to be impacting on the efficacy of the Model Code particularly as it affected elected representatives and, to a lesser extent, general managers and to suggest options for improvement. The positioning of the research was as a preliminary ‘testing of the water’ to see whether further research or other action was warranted to inform consideration of issues by LGNSW.

The key research activity involved telephone interviews of individuals from, or linked to, the NSW local government sector and who had experience in the operation of the Code from different perspectives. A group of about twenty individuals was identified by LGNSW staff and consultants involved in providing governance training and support to the sector. Each received an email explaining the proposed research and inviting participation. This group included mayors, councillors, general managers, complaint coordinators and conduct reviewers. A total of eleven (11) individuals agreed to be interviewed. All interviews were conducted with a promise of anonymity to ensure no individual or council could be identified. This was done to provide a safe context for the expression of frank views about the matters being researched.

It is not suggested that this group of eleven are necessarily a representative sample of council officials with experience in the operation of the Code of Conduct. However the group is a sufficient sample of convenience for the preliminary purpose of the research. A breakdown of the position of those interviewed appears in the Table below.

Category	No
Metro Council	4
Rural/Regional Council	5
Mayor	2
Councillor	1
General Manager	3
Complaints Co-ordinator	3
Investigator	2
TOTAL	11

As well as the group of council officials and investigators, representatives from the local government associations in South Australia, Queensland and Victoria were contacted and information and views provided about their approach to managing code of conduct matters.

The research has resulted in identifying a number of common themes which seem to militate against the effectiveness of the current Code of Conduct and its operation in certain circumstances. Furthermore, participants identified several priority areas of the Code warranting change.

Common Themes

The common themes presented in this report are discussed in three parts, namely *Overall Issues*, *Conduct Standards* and *Procedures for the Administration of the Code*. In discussing the common themes the terms *strongly agreed* and *agreed* are used. *Strongly agreed* is used when all or almost all of those interviewed supported directly, or by clear inference, the stated position. *Agreed* is used

to indicate that a majority of those interviewed supported directly, or by clear inference, the stated position.

Overall Issues

Source of Challenging Complaints – Strongly Agreed

It was strongly agreed that the challenges with the Model Code and its administrative procedures were generally limited to complaints made against elected members usually, although not exclusively, by other elected members, and complaints between elected members and general managers.

Problem a Minority of Councillors – Strongly Agreed

It was strongly agreed that by far the majority of the 1480 local government councillors in NSW behave appropriately and remain focused on doing the best for their local communities. The common view was that it is mostly a small minority of councillors who tended to be unreasonable and persistent in their inappropriate behaviour. This small minority were likely to abuse and exploit the procedures set down for the administration of the Model Code in order to prolong matters over many months. This prolongation, especially when accompanied by on-going media coverage, eroded public trust in the council. It also weakened the accountability of council officials as the link between inappropriate behaviour and consequence diminished and was seen to diminish. Furthermore it had the potential to damage important relationships and reduce morale and productivity.

Further Specification Not the Answer – Strongly Agreed

While there was some criticism of the complexity and lack of clarity of the current Model Code, it was strongly agreed that further detailed specification was unlikely to be an effective remedy to the challenging complaints involving elected representatives and/or general managers. Similarly it was a common view that the Model Code, or at least its implementation, had not been effective at reducing the on-going poor behaviour of a minority of councillors.

Positive Impact of the New Model Code - Agreed

A majority of those interviewed believed that the new Model Code incorporated some improvements, specifically citing the following:

- a. reasonable and appropriate standards
- b. improved separation and specification of roles
- c. strengthened recourse to independent and arms-length complaint assessment and investigation
- d. defined implementation procedures
- e. clearer procedural fairness requirements, and
- f. a workable process when complainants and those subject of a complaint behaved reasonably, and the Investigations and Performance Division of OLG were responsive when their involvement was required.

Conduct Standards

Agreed areas of concern with the conduct standards in the Model Code focused on the undue breadth of some provisions and the potential for misinterpretation of others.

Breadth of General Conduct Standards 3.1 to 3.3 – Agreed

Clauses 3.1 to 3.3 of the Model Code set some general conduct standards which were, in whole or part, regarded by a majority of those interviewed as too broad and therefore open to both abuse and a wide variety of interpretations. For ease of reference, the relevant sections are reproduced below.

3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute. Specifically, you must not act in a way that:

- a) contravenes the Act, associated regulations, council's relevant administrative requirements and policies*
- b) is detrimental to the pursuit of the charter of a council*
- c) is improper or unethical*
- d) is an abuse of power or otherwise amounts to misconduct*
- e) causes, comprises or involves intimidation, harassment or verbal abuse*
- f) causes, comprises or involves discrimination, disadvantage or adverse treatment in relation to employment*
- g) causes, comprises or involves prejudice in the provision of a service to the community. (Schedule 6A)*

3.2 You must act lawfully, honestly and exercise a reasonable degree of care and diligence in carrying out your functions under the Act or any other Act. (section 439)

3.3 You must treat others with respect at all times.⁴

While no-one suggested that these conduct expectations were inappropriate, the point was made that a number of them were so broadly worded, almost any behaviour short of exemplary could be alleged to offend them. For example phrases such as *council's relevant administrative requirements*, *detrimental to the pursuit of the charter of a council*, *exercise a reasonable degree of care and diligence* and *treat others with respect at all times* can be (and in fact have been) used to ground complaints. These sorts of complaints are readily able to meet the definition of a code of conduct complaint set out in the accompanying Model Code procedures because of the broad nature of the standards.

Matters of Interpretation - Agreed

The only other area of agreement regarding the Conduct Standards in the Model Code was the issue of interpretation. The argument was put that words and phrases such as *abuse of power*, *improper*, *unethical*, *prejudice* and so on, can and are, intentionally and unintentionally, interpreted differently. Furthermore, the important qualifying phrase *in carrying out your functions*, used in 3.1 and 3.2 (and the similar phrase *acting in their official capacity* used in the definition of a Code of Conduct complaint in the accompanying procedures) has been unclear and used to widen the behavioural net to make a complaint. In other words, this lack of specificity provides an opportunity to exploit the Code in ways that were probably not intended.

⁴ Model Code of Conduct for Local Councils in NSW, March 2013.

Administration of the Code

The area of greatest concern to those interviewed was the implementation of the Code. This is specified in the document known as the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW*.

Insufficient Independence – Strongly Agreed

Under the current Model Code the general manager has a significant initial role in relation to complaints against elected members except in certain prescribed circumstances. The role requires him or her to judge whether the complaint against a councillor or mayor can be dealt with by alternative means and if so, to pursue that course of action. Otherwise the matter is forwarded to the complaints coordinator for referral to an external conduct reviewer.

The general manager is required to make judgements which can potentially have negative or positive consequences for the complainant and the elected member who is the subject of the complaint. It was strongly agreed that this role for the general manager, while an improvement on the previous model code, nonetheless remains inappropriate. Reasons offered for this position included the following:

- a. the general manager is subject to the day-to-day direction of the mayor and should not be placed in a position where he or she is required to make judgements on disciplinary matters involving the mayor. This confuses the clear statutory accountability assigned to the relationship in which the mayor guides and directs the general manager within the policy boundaries established by the council
- b. the general manager is a servant of the council and to maintain professional neutrality in order to best support and enact the decisions of council, he or she should have no decision-making role in disciplinary matters involving members of the governing board. Such a role offends the principle of natural justice which requires the decision-maker in a matter able to bring detriment to be disinterested (that is having no interest of their own at stake) and unbiased and seen to be so.
- c. from the perspective of other elected members, staff and the public there is a potential lack of perceived independence with matters being initially determined by a subordinate of the council
- d. pressure can, and allegedly has been, brought to bear on general managers in order to improperly influence early assessment decisions
- e. the role demanded of the general manager in complaints about elected members is time-consuming, distracting and capable of damaging relationships with other elected members, staff and key stakeholders
- f. a minority of councillors do not accept the authority of the general manager in relation to code of conduct complaints to counsel, train, mediate, discuss or negotiate with them or request an apology of them, and
- g. where complaints involving elected members are the result of political in-fighting or interpersonal conflict, the general manager is usually in a no-win situation and is unwilling to take the risk of assuming a decision-making role in the complaint assessment task. This results in such matters invariably being forwarded to an external conduct reviewer, whether or not the seriousness of them justifies this course of action.

Inappropriate Mayoral Role – Strongly Agreed

Where complaints are made about the general manager, the mayor inherits accountabilities under the Model Code except in certain prescribed circumstances. The accountabilities require him or her to judge whether the complaint against the general manager can be dealt with by alternative means and if so, to pursue that course of action. Otherwise he or she forwards the matter to the complaints coordinator for referral to an external conduct reviewer.

It was strongly agreed that this was not an appropriate role for the mayor for the following reasons:

- a. complaint management is a complex field and requires knowledge and expertise not usually possessed by mayors. This can and has led to process breakdowns and inconsistencies in the application of required procedures. Examples were given of poor communication with complainants and those subject of complaints and the impact of long-term relationships between mayors and general managers which can have both professional and friendly dimensions, influencing the needed objectivity and confidentiality of the complaint management process
- b. many mayors simply do not want any role in managing complaints as it can threaten to disrupt delicately balanced relationships and alliances needed to ensure sufficient cohesion in the governing body, and
- c. to appoint the mayor as the sole point of reporting by staff about the general manager regarding Model Code complaints, was poor governance practice and confused the boundary between policy and administration.

Varying Quality of External Conduct Reviewers – Strongly agreed

It was observed by most of those interviewed that there was a wide variation in the expertise and experience of conduct reviewers leading to an equally wide variation in the quality of assessments and investigations and a somewhat inconsistent approach to recommendations. This quality issue also facilitated abuse of the Model Code procedures mentioned earlier in this report. Examples of poor quality assessments/investigations were cited where investigators had:

- a. permitted a continuous expansion of complaints
- b. failed to check facts
- c. been unwilling or unable to contain unreasonable procedural fairness demands, and
- d. recommended inappropriate sanctions given the seriousness of the breach and its impact on the council.

Other criticisms arising from the varying quality of conduct reviewers included poor communication processes and excessive time taken to complete assessments.

Role of OLG – Strongly Agreed

Perhaps the strongest views expressed in the interviews related to the role of OLG in code of conduct complaints. On the one hand, it was strongly agreed that the Innovation and Development Division of OLG provided a prompt, valuable and helpful service when their advice was sought on complaint matters and processes. On the other, there was almost unanimous condemnation of the Investigations and Performance Division, particularly in regard to what was seen as extremely lengthy time-frames taken to undertake and finalise investigations and other actions required of

them in the complaints process. High levels of acrimony were expressed at the loss of credibility and public trust suffered by councils and personal and professional stress suffered by individuals as they awaited outcomes from OLG. Several of those interviewed expressed this as a double standard, indicating that such poor governance practice would attract criticism from OLG if committed by a council. Examples were cited involving many months of waiting with one participant describing OLG's response capability as *appalling* and another saying that waiting for finalisation of matters by OLG left the council with an *elephant in the room which left staff on tender-hooks and higher than normal levels of suspicion all round*.

Incommensurate Punitive Consequences – Strongly Agreed

Linked to what was seen as OLG's poor response capability was the issue of highly inadequate punitive outcomes from investigations. This was also expressed in relation to matters fully managed by councils in that the Local Government Act did not provide sufficient options for councils to impose commensurate sanctions. Examples were given of matters involving serious breaches of the code resulting in recommendations for training or counselling. As well as a reluctance to impose more serious sanctions when justified, the view was expressed that currently sanction options were limited and few have any significant deterrent value.

The point about the inadequate application of commensurate sanctions and lack of sanction options was seen to legitimise poor behaviour. Coupled with the issue of excessive time-frames due to abuse of process by complainants or complaint subjects, the poor quality of some investigators or the inadequate response capability of OLG, it was not surprising that these more problematic complaint matters tended to inflict high levels of collateral damage on people, organisations and the local government sector more broadly.

In summing up the role of OLG and the issue of incommensurate punitive outcomes, one participant simply stated that councillors and staff had lost confidence in OLG who were seen to undermine their own Model Code because of such poor response times and reluctance to take appropriate enforcement action.

One-off Issues

A number of other issues were raised by participants without necessarily being discussed by all of those interviewed or resulting in an identifiable level of consensus. Nonetheless the issues seemed to have some inherent importance and are described below.

Complaints by the General Manager about Elected Representatives

The Model Code does not anticipate the need for general managers to make code of conduct complaints about elected representatives. In the circumstances, it would likely be inappropriate for the general manager to make a complaint in writing to the mayor. As this situation has arisen in the sector, with relevant protocols undefined and unclear, some thought needs to be given to how this scenario ought to be managed.

Sector-wide Database

At present, there is no sector-wide database recording information about council officials who breach the Model Code and the circumstances which led to the breach. This prevents prior breaches

being taken into account when sanctions are considered, particularly by investigators, and denies the opportunity to identify emerging issues which could head-off problems or inform improved processes or training. Such a database would also provide a wider picture of complaint data which could assist in making more balanced inferences about trends and governance health across the sector.

Variable Transparency

The extent to which councils are required to put information in the public arena about code of conduct matters involving elected members does not follow clearly stated principles of transparency. This results in some perverse outcomes. One example given was a complaint against a councillor being resolved by alternative means (counselling) because of its minor nature. However the complainant (another councillor), once advised of the resolution by the general manager as required by the Model Code, made public statements about his complaint and how it resulted in action against the offending councillor. The matter was then left up to the counselled councillor to try and redress the public imbalance.

In a second example, a finding of a breach by a councillor was made resulting in a censure motion. The letter of the Model Code was applied so the only information ending up in the public arena was the fact of a censure motion against a named councillor but no contextual information about the relevant facts. There may well be a need to re-visit the transparency and reporting requirements of the Model Code with processes based on some clear principles of disclosure for those in public office.

Lessons from other Jurisdictions

Local government codes of conduct and complaint management regimes in other Australian jurisdictions are quite mixed in terms of approach. However each has some interesting features relevant to the key issues raised by participants.

South Australia

South Australian local councils did not have a sector-wide code until 2013 when behavioural and misconduct requirements were brought in by regulation under the Local Government Act. The requirements were for elected members only and a separate code was created for staff.

Under the 2013 change, individual local councils are responsible for dealing with behavioural complaints against councillors and have the discretion to develop procedures of their own provided they meet a few general requirements in the regulation. More serious matters of misconduct are usually referred to other agencies for investigation similar to the NSW approach.

The South Australian local government sector has been unhappy with aspects of the recent sector-wide code, and a new model code is currently being developed. However responsibilities for managing complaints will not change significantly.

The South Australian scheme has three features of interest, given the issues raised by participants in this research. They are:

- a. the establishment of a well-structured series of panel arrangements following the introduction of the sector-wide code in 2013 which is available to local councils for assessment and investigation of behavioural code complaints in a potentially arms-length manner with referral decisions being made in accordance with a procedure determined by the council
- b. breaches of the behavioural code must be the subject of a public report to a council meeting, and
- c. available sanctions to the council for behavioural breaches by elected members includes the usual options with the addition of the authority by resolution to remove or suspend a councillor from a position within the Council other than the position on council itself. While it was not known how often this sanction had been used, as no sector-wide statistics are collected, the opinion offered by the LGASA was that the embarrassment factor of suspension or removal acted as a useful deterrent.

Some of the criticisms raised by the local government sector in South Australia about the Code and its implementation are similar to NSW. This included the cost of resolving complaints, inconsistent levels of complaint management expertise across councils and the desire for a code that is clearer and more precise in its meaning. However there were no significant concerns about time-frames other than an occasional complaint about the length of time the Ombudsman had taken to finalise an investigation.

Queensland

While the requirement for a councillor code of conduct was repealed by the Queensland Government some years ago, the remaining statutory scheme is quite complex. There is also the added complexity of dual legislation; the Local Government Act 2009 and the City of Brisbane Act 2010, each of which contain provisions relating to councillor complaints and complaint management processes and responsibilities.

Like South Australia and to some extent NSW, Queensland has a tiered scheme based on the seriousness of the conduct. The tiers are inappropriate conduct (largely managed by each council), misconduct (managed by statutory regional panels or in more serious cases the Local Government Remuneration and Discipline Tribunal) and official misconduct (managed by the Crime and Misconduct Commission). While individual councils assess and investigate inappropriate conduct complaints following initial assessment by the Chief Executive Officer, and seem to have only weak sanction powers available, some other elements of their scheme overall are quite different to NSW. This includes:

- a. regional panels which have significant authority to investigate matters and impose a variety of sanctions including a monetary imposition of up to \$5,500.00
- b. a well-defined escalation protocol from the council to the regional panel for repeated breaches
- c. the requirement for the mayor to take disciplinary action in the case of councillors guilty of inappropriate conduct, and

- d. complaints by mayors or chief executive officers being dealt with by the Department of Infrastructure, Local Government and Planning, presumably as they are likely to be more serious complaints of inappropriate conduct.

The Queensland Local Government Association indicated that by-and-large, there were no major sector-wide issues with the inappropriate conduct provisions or the overall implementation of the misconduct requirements.

Victoria

As is commonly the case in the other jurisdictions, more serious complaints against councillors in Victoria are dealt with by other bodies. Of particular interest in the Victorian approach is how it deals with misconduct complaints (the equivalent of behavioural complaints in South Australian and inappropriate conduct complaints in Queensland) against elected members and is described in some detail below.

Since 2008 Victorian local councils were required to have a councillor code of conduct which included certain minimum requirements set out in their Local Government Act 1989. Most councils augmented the minimum requirements with additional conduct standards and defined how they wished to frame dispute resolution processes involving councillor-to-councillor complaints.

However a councillor, group of councillors or the council itself by resolution can refer a matter of a suspected misconduct breach by a councillor to a Councillor Conduct Panel, whether or not alternative means have been attempted. These are statutory panels empowered to determine their own procedures, hear evidence, make findings and impose penalties including up to three months suspension. The Panels are not a standing arrangement, but created when a matter needs to be heard and determined. They are not empowered to direct the presentation of material or compel witnesses, but failure to meet Panel requests for information can result in the matter being transferred to the Victorian Civil and Administrative Tribunal (VCAT) where material and witnesses can be compelled and more serious sanctions imposed if a breach is determined.

The Municipal Association of Victoria (MAV) manages the procurement process of establishing suitable lists of individuals who can be appointed as Panel members. A Panel is constituted by two members who meet certain requirements. When a councillor, group of councillors or the council as a whole want a misconduct complaint to be referred to a Panel, they advise the Councillor Conduct Registrar. Each local council appoints a Registrar who is usually a senior member of staff. The Registrar has no decision-making or oversight role. The purpose of the position is purely administrative. The registrar liaises with the MAV to instigate the appointment of the Panel and provides administrative support to the Panel. The council pays for the Panel member's time and expenses.

The councillor/s bringing the complaint are expected to present their case to the panel along with any evidence they have which may include other individuals as witnesses. The Panel can reject the complaint and suggest an alternative resolution process. If the Panel decides to hear the matter, councillor complainants need to be prepared and organised as they cannot simply proffer a quick allegation and leave the process to others.

When the Panel has concluded hearings, it makes a finding and gives reasons for its determination. The Panel's findings must be presented to an open meeting of the Council. Parties can appeal the Panel's decision to the VCAT.

While there is more detail about the Victorian approach, its key feature of interest is the significantly more arms-length and independent process used to investigate conduct complaints. Council officials have no assessment, discretionary or decision-making role but a procedural one in order to trigger the formation of the Panel. The MAV establishes and maintains the lists of suitably qualified Panel members, also keeping the selection of Panel members at arms-length from the council.

As there is no sector-level data about misconduct complaints in Victoria, it is difficult to judge the strengths and weaknesses of their approach. The MAV indicated that panels had not stopped politically motivated complaints by one councillor about another but acknowledged that the more independent approach remained a strength of their regime.

Suggested Improvements

It was generally agreed that no one improvement could resolve the challenges with the Model Code; rather it would be a matter of a suite of changes that would build improvement over time. While a number of improvements were identified by participants and others gleaned from schemes in other jurisdictions, more work is needed from the sector to identify options. This work could focus on the five key areas which reflect the priorities of those who participated in this research and who were determined to remain focused on the most relevant issues. The areas are:

- a. independence
- b. sanctions
- c. clarity and consistency
- d. expertise, and
- e. timeliness.

Independence

There was almost unanimous support for greater independence in the complaint assessment and investigation process, especially when dealing with complaints against elected members. The preferred approach was a third-party model in which the assessment and investigation of complaints was directly dealt with by an independent body at arms-length from the council. This change was seen to be one that would effectively address the issues raised regarding the insufficient independence of the current scheme.

Whether this independent body dealt with all complaints about elected members, as is the case with the panel arrangements in South Australia, or only those initiated by other elected members, as is the case in Victoria, is a matter for further discussion. Certainly the more formal hearing discipline imposed on councillor complainants in the Victorian model may well reduce the incidence of minor matters being subject to lengthy and expensive investigations, and/or weigh against the likelihood of

process abuse. A third-party model may also be a suitable solution for dealing with complaints about the general manager or complaints by the general manager about elected representatives.

Sanctions

It was strongly agreed that a greater range of sanctions needed to be available to the OLG and to councils if they were to continue to impose penalties for breaches of the Model Code. At the very least, councils should have the authority similar to the South Australian scheme to suspend or remove elected representatives from positions and committees other than the council itself. This suspension or removal could carry with it an automatic temporary (in the case of suspension) or permanent (in the case of removal) reduction in the annual councillor allowance.

Additionally, there should be a clear escalation process for repeated breaches of the Model Code which provides for more severe penalties. The more severe penalties should be automatic, such as disqualification from holding office for a specified period. Where a councillor has been found to have committed a serious breach of the Model Code, an individual performance improvement order should be issued which sets out a suitable remediation and learning program. Failure to comply with the order should result in suspension and ultimately disqualification. Other sanction options should be explored.

A cautionary note was expressed by a number of those interviewed suggesting that without a willingness on the part of the Government to meet serious breaches with serious consequences, an increase in sanction options would have little impact in reducing poor behaviour.

Clarity and Consistency

To ensure that the Model Code and accompanying procedures are clear in their meaning and are consistently applied, a number of guidelines and explanatory notes were suggested. These would not extend the Model Code or procedures but focus on building a common understanding of the key terms and processes as well as facilitating greater consistency of application. The material would contain examples and explain terms by identifying what is and what is not meant by a particular word or concept.

Guidance was also suggested to assist in the consistent management of critical parts of the assessment, investigation and final sanction process. For example guidance on the different alternative and punitive sanctions and when they are appropriate to apply would help in bringing about a more consistent approach by conduct reviewers, councils and the OLG and ideally improving the alignment between the inappropriate conduct and the consequence. Further discussion with the sector is needed to identify and prioritise required guidance material.

Expertise

It is clear that competencies and experience standards need to be developed as part of a minimum level of qualification for conduct reviewers. This is required to bring about the necessary levels of knowledge and skill to perform the role effectively. A good starting point would be to explore the Vocational Education and Training (VET) sector as relevant training and certification already exists. This will need augmentation in terms of the professional experience required to perform the role. A sector working group could advance this important initiative and help formulate a solution. Some

work has been done by the MAV through their role in assisting to constitute statutory conduct panels in Victoria.

Timeliness

Good governance practice requires allegations of inappropriate conduct, whatever the level of seriousness, to be dealt with competently and promptly. The length of time taken by OLG to conclude investigations and associated actions is seen as the major issue detracting from the effectiveness and preventative capacity of the Model Code. Where possible, statutory change should be used to reduce or eliminate unnecessary time delays such as the requirement for OLG to re-investigate matters which have already been competently investigated by a conduct reviewer. This sort of change needs to be accompanied with a genuine review of the resource challenges preventing prompt investigative action by the OLG. A lack of resources, even for smaller councils, is not accepted as an excuse for poor governance practice and the same standard should apply to the sector's regulator.

Conclusion

This research project has confirmed the anecdotal view that while the Model Code is working satisfactorily in general, in certain circumstances it is failing to deal with or reduce on-going or repeated poor councillor behaviour. This failing, while only involving a small minority of elected representatives, represents a high cost in terms of resources, public confidence and personal stress.

Through a process of sector interviews the main causes of this ineffectiveness have been suggested. As the sample of participants was one of convenience, further validation would be needed to conclude the causal effects with any certainty.

Priority areas for change have been identified and these are strengthening the independence of the assessment and investigation regime, especially for elected members; a wider variety of sanctions applied more commensurately; improved clarity and consistency in the application of the Model Code and its procedures; greater expertise and applicable standards for conduct reviewers and a drastic improvement in the time taken to conclude misconduct investigations and other actions which are the responsibility of the OLG.

Of particular note was the sentiment expressed by many of those interviewed that changes to the Model Code should concentrate on addressing the specific problem of on-going councillor to councillor or councillor to general manager poor behaviour. It was also evident that while a number of specific changes and improvements have been proposed in relation to this area of focus, they are by no means exhaustive and additional sector consultation would elicit further valuable ideas.

Nonetheless some changes could be considered suitable to embrace now whilst others require further investigation and policy consideration. The recommendations below reflect this distinction.

I would like to thank those individuals who participated in this research project. They gave their time and views generously and for some, it was not easy re-visiting their experiences.

Recommendations

Strengthened Independence of Assessment and Investigation Regime

That LGNSW further investigates and considers the Victorian approach for dealing with councillor to councillor complaints and whether its application in the NSW jurisdiction in similar circumstances, including councillor to general manager complaints, is worthwhile in light of the issues raised in this research report.

More Sanction Options More Commensurately Applied

LGNSW consider developing a more comprehensive report on sanctions in four respects:

5. the types of sanctions that should be available to apply when a breach of the Model Code by a councillor is determined
6. the circumstances in which such sanctions would be applied
7. the possibility of a form of individual performance order to enforce certain sanctions (for example apologies, counselling and training), and
8. what person or body should have the authority to apply the sanctions and what sanctions should be applied automatically.

Clarity and Consistency of Meaning and its Application in Practice

LGNSW initiate a project, possibly in conjunction with the OLG, to develop material in support of the Model Code and its procedures which assists in building a sector-wide understanding of key terms and concepts and the application of these in practice.

Improved Standards for Conduct Reviewers

OLG be requested to review the requirements for conduct reviewers with the aim of developing a more robust and specific set of standards that permit appointment to the role based on clearly stated competencies, skills and experience.

Improved Timeliness of Response from OLG

That OLG be provided with the feedback from this report concerning the inadequate response of the Investigation and Performance Division and their commitment sought to address process and resource issues so that an appropriate response capability can be provided.

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