



Guidelines for the Model Code of Conduct for Local Councils in NSW

Department of Local Government

December 2004

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1 Purpose of these guidelines

These guidelines have been developed to assist councils to review and enhance their codes of conduct. All councils must adopt a code of conduct that incorporates the provisions of The Model Code of Conduct for Local Councils in NSW pursuant to section 440 of the *Local Government Act 1993*. Once adopted, council officials must observe the code of conduct.

The Model Code of Conduct for Local Councils in NSW replaces the Department of Local Government Practice Note No 6 (the previous model code of conduct). All councils should review their existing codes to ensure that they reflect the minimum requirements specified in the revised, mandatory model code of conduct. These guidelines will assist councils to develop their codes of conduct and provide guidance in achieving better practice.

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2 Introduction

These guidelines support The Model Code of Conduct for Local Councils in NSW. Councils must adopt the model code of conduct provisions but may include provisions that supplement the model code. These additional provisions must be consistent with the spirit and intent of the model code of conduct provisions or else they will be invalid. These guidelines provide information to assist councils to develop a code of conduct that meets their individual needs.

These guidelines identify the key topics that should be addressed in every council's code of conduct and the relevant principles and key legislation that underpin these areas. Some sections also include **optional** better practice suggestions and concepts on the topic that councils may consider including in their code. Where appropriate, examples and further reference material on the topic are provided.

These guidelines also set out the administrative procedures that councils should apply to reporting alleged breaches, dealing with allegations and sanctions that may be applied for proven breaches.

These guidelines contain:

- an introduction to the guidelines
- the role of the code of conduct
- the development, implementation and review of the code of conduct
- specific topics to be included in the code of conduct
- a glossary and relevant resources on code of conduct issues.

3 Statutory requirements

Section 440 of the *Local Government Act 1993* requires that every council must adopt a code of conduct to be observed by councillors, members of staff of council and delegates of the council. A council must, within 12 months after each ordinary election, review its adopted code of conduct and make such changes as it considers appropriate and are consistent with section 440.

Section 440 states:

1. *The regulations may prescribe a model code of conduct (the **model code**) applicable to councillors, members of staff of councils and delegates of councils.*
2. *Without limiting what may be included in the model code, the model code may:*
 - (a) *relate to any conduct (whether by way of act or omission) of a councillor, member of staff or delegate in carrying out his or her functions that is likely to bring the council or holders of civic office into disrepute, and*
 - (b) *in particular, contain provisions for or with respect to conduct specified in Schedule 6A.*
3. *A council must adopt a code of conduct (the **adopted code**) that incorporates the provisions of the model code. The adopted code may include provisions that supplement the model code.*
4. *A council's adopted code has no effect to the extent that it is inconsistent with the model code as in force for the time being.*
5. *Councillors, members of staff and delegates of a council must comply with the applicable provisions of:*
 - (a) *the council's adopted code, except to the extent of any inconsistency with the model code as in force for the time being, and*
 - (b) *the model code as in force for the time being, to the extent that:*
 - (i) *the council has not adopted a code of conduct, or*
 - (ii) *the adopted code is inconsistent with the model code, or*

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(iii) the model code contains provisions or requirements not included in the adopted code.

6. *A provision of a council's adopted code is not inconsistent with the model code merely because the provision makes a requirement of the model code more onerous for persons required to observe the requirement.*
7. *A council must, within 12 months after each ordinary election, review its adopted code and make such adjustments as it considers appropriate and as are consistent with this section.*
8. *Nothing in this section or such a code gives rise to, or can be taken into account in, any civil cause of action, but nothing in this section affects rights or liabilities arising apart from this section.*

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4 Definitions

In The Model Code of Conduct for Local Councils in NSW and the Guidelines the following definitions apply:

Council official	includes councillors, members of staff of council and delegates of council
Delegates of council	a delegate of council is a person or body to whom a function of council is delegated
Designated person	see the definition in section 441 of the Local Government Act 1993
Act of disorder	see the definition in clause 29 of the Local Government (Meetings) Regulation 1999
The Act	the Local Government Act 1993
Pecuniary interest	an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated (<i>sections 442 and 443</i>)
Non-pecuniary interest	a private or personal interest the council official has that does not amount to a pecuniary interest as defined in the Act (for example; a friendship, membership of an association, society or trade union or involvement or interest in an activity and may include an interest of a financial nature)

The term “you” used in the model code of conduct and the guidelines refers to council officials.

References to sections in the model code of conduct are references to sections in the *Local Government Act 1993*.

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5 Role of the code of conduct

Councils have a responsibility to serve the community in fulfilling the requirements of their charter under section 8 of the Act.

Councillors are elected to represent the interests of the residents and ratepayers. As a member of the governing body of the council, councillors play a key role in creating and reviewing the council's policies and objectives. Staff have the responsibility of serving the community and owe their allegiance to the council as their employer. Staff must also know and understand the law relevant to the performance of their official duties.

The community rightly expects councillors and staff to be honest, reasonable and equitable in their dealings with them and to have the public interest at heart. The code of conduct is a key mechanism to assist council officials to act honestly, ethically, responsibly and with accountability.

In this guideline the term council official is used to describe councillors, council staff and council delegates. Council delegates may include council's contractors, consultants, volunteers, members of advisory and section 355 committees, Independent Hearing Assessment Panels and community representatives.

5.1 Who does the code apply to?

The code of conduct applies to councillors, members of staff of councils and delegates of councils (council officials). It requires them to act honestly, ethically and responsibly in the performance of their duties.

Contractors working with council will be required to adhere to the relevant provisions of council's code of conduct during their contract period. Councils should make provision in contracts to reflect this condition.

Community representatives and volunteers working with council should also be required to observe the relevant provisions of council's code of conduct.

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5.2 Are council officials obliged to comply with the code?

The model code sets out a standard of conduct that meets accepted principles and statutory provisions applicable to local government activities. Council officials must observe the applicable provisions within the code. It is their personal responsibility to observe the standards in the code and regularly review their personal circumstances with this in mind.

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6 Development, Implementation and Review

A council must, within 12 months after each ordinary election, review its adopted code of conduct and make such changes as it considers appropriate and as are consistent with section 440 of the Act. Councils may wish to review their codes of conduct more frequently. Periodic reviews are a good way to ensure the code remains relevant.

6.1 Using these guidelines

All councils must include in their codes the minimum requirements outlined in The Model Code of Conduct for Local Councils in NSW. Councils may consider supplementing their codes with additional topics that reflect the specific needs of council. These additional provisions must be consistent with the spirit and intent of the model code of conduct provisions or else they will be invalid.

The topic sections of these guidelines provide additional information on how the principles listed in the model code of conduct should be interpreted and applied in practice. Councils should also consider adopting a number of policies to support the code of conduct. Where possible, policies that relate to the code of conduct should be referenced in the code. This enables council officials to gain further information and guidance in relation to particular topics.

These guidelines include a number of examples and case studies to illustrate the ethical problems that council officials might encounter and strategies for dealing with them. These examples can be used to assist councils to develop their own examples that are relevant to their circumstances.

6.2 Developing council's code of conduct

When councils develop their codes of conduct they should consider how the document will be integrated into their organisation's culture. Codes of conduct should be developed by each council and its staff to meet their specific needs, and should promote an ethical culture within the council.

Selecting the appropriate language and terms in a code of conduct assists council officials to understand the requirements outlined in the code. In the model code of conduct, the term "you" is used to emphasise the individual obligations of council officials.

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General managers should require all council officials to sign a statement that they have received and read their obligations under the code of conduct.

Councils may wish to consider developing a summary of their code of conduct that can be readily distributed throughout the organisation. This summary should be supported by the more detailed code of conduct.

Councils may also consider providing a copy of the code of conduct to prospective councillors on nomination to assist them to understand their obligations.

Councils are encouraged to use the ICAC publication, 'Codes of Conduct: The next stage' to assist in developing their code of conduct. This publication includes a checklist as a guide in developing, implementing and reviewing the code.

There is also an Australian Standard (AS 8002-2003) on Organizational Codes of Conduct. Councils are encouraged to ensure that their code of conduct meets the Standard's requirements.

Simply having a code of conduct is not enough. The process used to develop, implement and regularly and systematically review the code is critical in ensuring its effectiveness. Developing a code of conduct is not just a project. It is a process that requires a range of strategies to reinforce the standards of behaviour that are expected from council officials.

6.3 Promoting council's code of conduct

A code of conduct needs to be an active policy document that is promoted throughout council. Some strategies to promote the code include:

- providing regular on-going training, awareness-raising and information sessions. This training should be provided and made available to all council officials
- training tailored to meet the needs of the particular council officials, such as in-depth sessions on matters that relate to the duties of particular staff members

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- ensuring that the induction process emphasises the importance and relevance of the code of conduct and provides new officials with a thorough understanding of its content and consequences of non-compliance
- nominating an officer to be responsible for ensuring that training is conducted and the code of conduct is actively promoted throughout the organisation
- including the code of conduct in information packages sent to job applicants, attached to letters of offer to prospective staff members and referred to during job interviews
- including regular segments about aspects of the code of conduct in staff circulars and newsletters
- explicitly considering the code of conduct in the context of policy and procedural reviews
- ensuring that the code of conduct is readily accessible to all council officials.

Councils should also promote their codes of conduct to the community by placing them on their websites and making them easily accessible. Councils should ensure that the code of conduct is easy to locate. In this way community awareness is raised about the standards that are expected from council officials.

7 Topics to be addressed

This section of the guideline contains a number of key topics that should be included in council's code of conduct. Under each topic heading there is:

- an introduction to the topic
- the Key legislation
- a reference to the relevant section in the model code
- optional better practice suggestions (where applicable)
- examples and case studies relevant to the topic (where applicable)
- suggested policy requirements (where applicable)
- resources (where applicable).

7.1 General conduct obligations

Council officials must act honestly and responsibly when carrying out their functions. They have a responsibility to behave professionally and to develop and maintain constructive working relationships.

Key legislation

- *Local Government Act 1993, sections 8, 352, 439, 440 – (these sections refer to the council's charter, the independence of staff and the requirement for council officials to act honestly and with care.)*
- *Local Government (Meetings) Regulation 1999*
- *NSW Anti-Discrimination Act 1977*
- *Federal Anti-Discrimination legislation*
- *Ombudsman Act 1974*

Model code provisions

See section 5 of The Model Code of Conduct for Local Councils in NSW.

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Optional better practice

Councils' codes should function as active guides to decision making. Codes of conduct will be more effective if they include information that assists council officials to understand and manage more difficult situations that may arise. Councils may wish to consider including these specific provisions in their codes of conduct.

Appointments to other organisations

You may be appointed or nominated by the council as a member of another body or organisation. (For example, appointment to a regional organisation of councils.) If so, you will be bound by the rules of conduct of both organisations.

Alcohol and other drugs

Intoxication by alcohol or being drug affected is an unsafe personal condition and is proven to be a hindrance to the performance of official duties. A person, so affected, cannot provide the high standard of service required. Such a person could also expose others to an unacceptable level of risk.

Health, wellbeing and safety

You should ensure that council's premises are adequate to ensure the health, safety and well being of other council officials and members of the public.

Public comment by council staff

"Public comment" includes public speaking engagements (including comments on radio and television), expressing views in letters to the press or in books or notices or where it is reasonably foreseeable that publication or circulation will enter the public domain.

As a member of the community council staff have a right to enter into public debate in their private capacity. However, council staff must take care not to give the impression that their comments are made on behalf of council. Council staff will need to clearly state that such public comment reflects personal opinion. Public comment or statements on council matters should only be made in accordance with council's policy.

Councils may wish to consider including in their codes and associated policies, the following information to assist council officials:

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Child protection code of conduct

Under the Ombudsman Act 1974 the head of a designated agency or public authority is responsible for ensuring systems are in place for recording and responding to all allegations of a child protection nature against an employee.

The head of an agency is required to determine which allegations and convictions are to be notified to the Ombudsman as a reportable allegation or conviction and which matters are exempt from notification. These exemptions require a code of conduct which includes details of what behaviour by employees is reasonable for the purpose of the discipline, management or care of children. The code of conduct should also clarify what is acceptable and what is not acceptable behaviour by employees towards children, as well as what will happen if an employee breaches the council's code of conduct.

Councils are encouraged to consider including supplementary information in their code of conduct that relates to child protection matters. Information to assist this process is contained in the NSW Ombudsman's child protection in the workplace guidelines.

Suggested policy requirements

Councils' codes should be consistent with other policies that councils develop. Councils should consider developing policies that provide specific guidance on matters contained in the code of conduct. For example:

1. A policy and the procedures to be followed for reporting and managing situations related to the effects of drug and alcohol use.
2. A policy and procedures to prevent and deal with harassment and discrimination.
3. A Code of Meeting Practice to meet their individual circumstances. The Code should incorporate the provisions of the *Local Government (Meetings) Regulation 1999* and may supplement that Regulation with provisions that are not inconsistent with it. The Code of Meeting Practice should include examples of situations councillors may face during council meetings and strategies to deal with them.
4. A policy on public comment on council matters.

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Resources

NSW Ombudsman, 2004, *Child protection in the workplace*.

7.2 Conflict of interests

The possibility of conflict between public duty and private interest is an ever-present risk for council officials. Sometimes, by virtue of their official status, position, functions or duties, council officials have the power to make decisions or act in ways that can further their own private interests. This may cause a real or perceived conflict between council officials' private interests and their public duty.

It does not matter whether a conflict of interests is actual or merely a conflict that could be reasonably perceived to exist by a third party. Both situations negatively impact on public confidence in the integrity of local government.

This section outlines the requirements for preventing and managing a conflict of interests.

Key legislation

- *Local Government Act 1993, Chapters 11 and 14 – (these sections refer to how councils are staffed and the honesty and disclosure of interests.)*
- *Local Government (General) Regulation 1999, Part 5A, Schedule 2*

Model code provisions

See section 6 of The Model Code of Conduct for Local Councils in NSW.

Optional better practice

Councils' codes should function as active guides to decision making. Codes of conduct will be more effective if they include information that assists council officials to understand and manage more difficult situations that may arise. Councils may wish to consider including these specific provisions in their codes of conduct.

Club/organisation membership

If you are a member of a club or other organisation, for example, sporting, religious, community group, you should consider whether your membership gives rise to a conflict of interests in council matters that may affect the club or organisation. The greater your involvement with the club or organisation, the greater likelihood of a real or perceived conflict of interests.

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Personal relationships

You should consider the depth of a personal relationship in deciding whether or not it gives rise to a conflict of interests.

Sponsorships

Sponsorships should not limit council's ability to carry out its range of functions fully and impartially or influence a council decision. You must never ask for or receive any personal benefits from a sponsorship arrangement.

Lobbying

You may be lobbied by a wide range of people, including individuals, organisations, companies and developers. As a general rule it is an essential element of the democratic system that any individual should be able to lobby the council or a councillor. However, particular considerations apply when you are dealing with statutory powers such as planning.

You must consider evidence and arguments put by a wide range of organisations and individuals in order to perform your duties effectively. However, councillors should not respond to oral requests for concessions and require written application to be made to the general manager for evaluation by council staff and reporting to council of all the consequences of granting the request.

Caucus votes

Binding caucus votes on matters is inconsistent with the obligation of each councillor to consider the merits of the matter before them. Political group meetings must not be used to decide how councillors should vote on matters like development applications where there are specific statutory considerations for each decision-maker to consider.

Former council officials

You must be careful in your dealings with former council officials and make sure that you do not give them, or appear to give them, favourable treatment or access to privileged information.

Former council officials must not use, or take advantage of confidential information obtained in the course of their official duties that may lead to gain or profit. At the end of your involvement with council, you must:

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- return all council property, documents or items (keys, mobile phones etc)
- not make public or otherwise use any confidential information gained as a consequence of your involvement with council.

Staff political participation

Council staff must ensure that any participation in political activities does not conflict with your primary duty as an employee to serve the council of the day in a politically neutral manner.

Councils may wish to consider including in their codes and associated policies, the following information to assist council officials:

Information to guide decisions about conflict of interests

There are a number of questions that council officials can ask themselves to help in deciding whether or not they have a conflict of interests or whether their behaviour could create the impression that there is a conflict. Councils could consider providing some of this information in their code of conduct to assist council officials. A detailed list of questions is located at:

- How to decide what is a conflict of interests, page 8, Under Careful Consideration: Key Issues for Local Government, 1997, ICAC/Department of Local Government.

There are some options for avoiding or dealing with a conflict of interests provided in the code of conduct minimum requirements. Councils may consider whether a more extensive list of options would be more useful for their circumstances. A more extensive list of options can be found at:

- Options to avoid or deal with a conflict of interests, Fact Sheet No 3, Conflict of Interests, 2003, NSW Ombudsman. (available on Ombudsman's website)
- Pre-requisites to avoid or manage conflict of interests, 2004, NSW Ombudsman.

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Senior adviser on conflict of interests

Councils should consider nominating a senior officer or engaging a suitably qualified person, such as a solicitor or auditor, to provide objective advice to council officials on conflict of interests matters. Alternatively, councils could include as part of the role of the conduct committee (referred to in the model code of conduct) providing advice to council officials on conflict of interests issues. This person (or committee) would provide advice only and not be involved in making the decision on how the matter should be handled.

Advice would constitute guidance on the criteria to help make a decision and the range of options available to an individual. This advice should not be considered a legal opinion and council officials may need to obtain their own legal advice on the matter. The onus is on the individual to determine what action to take, particularly in relation to a non-pecuniary conflict of interests.

(Refer to the NSW Ombudsman Annual Report 2002-2003, page 38, for information on the establishment of a panel to provide advice on conflict of interests.)

Community representatives on council committees

Councils often invite interested members of the community to join council committees. Usually the reason for their involvement is due to specific knowledge, experience and expertise in the business of the committee. Questions can arise as to whether this knowledge, experience and expertise gives rise to a pecuniary or non-pecuniary conflict of interests. This personal interest in the broad issues is generally well understood and would not need to be disclosed.

If the committee is not “wholly advisory”, that is, it exercises some functions of council, then delegates’ pecuniary interests would need to be dealt with in accordance with section 451 of the Act. If the committee is a “wholly advisory” committee, then in the case of pecuniary interest, delegates are exempt from the pecuniary interest provisions of the Act. (*section 446*)

If a non-pecuniary conflict of interests arises that relates to specific committee business, community representatives will be expected to comply with the conflict of interest provisions of council’s code of conduct. This requires that, as a minimum, community representatives disclose the nature of any conflict.

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Examples

Councils' codes should provide examples and/or case studies to illustrate the ethical problems that council officials might encounter and strategies for dealing with them. These guidelines include some examples to guide councils in developing their own examples relevant to their council's circumstances. Further case studies relating to conflict of interests can be found at:

- Case studies and examples, pages 5-14, Under Careful Consideration: Key Issues for Local Government, 1997

The possibility of conflict between public duty and private interest is an ever-present risk for council officials. A conflict of interests can be of two types: pecuniary and non-pecuniary. Where a conflict of interests is pecuniary in nature, you must comply with the Act.

Example 1: Pecuniary interest and perception

A council has a practice of suspending standing orders to enable councillors to freely discuss issues before them. During one of these times, councillors discuss a matter relating to the purchase of a property. One of the councillors is a property agent whose company is acting for the council in the transaction. The councillor participates in the discussion during the period while standing orders are suspended.

When standing orders are resumed, this councillor declares a pecuniary interest and leaves the room. The councillor does not believe that there is a pecuniary interest in the matter until there is a formal debate and vote on the matter.

If the councillor has a pecuniary interest in the matter, within the meaning of section 442 of the *Local Government Act 1993* and no exemption can be relied upon, then a pecuniary interest exists during the entire period the matter is being considered, including during the discussion when standing orders are suspended. This equally applies to councillor participation on advisory committees.

Section 451 requires that a councillor not only declare the nature of an interest in a matter before council for consideration, but must also not be present at, or in sight of, the meeting at any time during which the matter is being considered or discussed or voted on by the council or committee.

This applies to committee meetings, closed meetings and meetings where standing orders have been suspended. The practice of allowing an affected councillor to make a statement before leaving a room is a breach of the provisions of section 451 of the Act.

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Example 2: Secondary employment

Secondary employment, with or without permission, can lead to a conflict of interests. A local government building trades overseer prepares a report for his manager on allocating council plumbing work. He has a plumbing company that put in a bid, but was not selected. There is a conflict of interests because the overseer responsible for recommending the awarding of contracts is also competing to secure the work and has not disclosed that personal interest.

Under the *Local Government Act 1993*, all council staff must obtain the consent of the general manager for any secondary employment that relates to the business of council or might conflict with their council duties. The general manager in this case would be entitled to refuse consent. To put strict measures in place to prevent the overseer from having any role in contract work may not be enough to prevent conflicts.

Example 3: Political support

A potential conflict of interest could arise for a councillor when a campaign donor who contributes financially to the councillor's election campaign has a matter before the council for determination.

In this situation a councillor should consider the public perception of the relationship. Options for the councillor include:

- Declaring an interest and not participating in discussion or voting on the matter
- Declaring an interest, participating in the discussion on the matter but not voting
- Declaring an interest in the matter and participating in the discussion and voting as the conflict is deemed to be insignificant

NOTE: Extreme care should be taken if the nature of the relationship may constitute a pecuniary interest (for example, where it could be perceived that a donation will be given on the understanding that the councillor will provide support on a particular matter should he or she be elected). Such an arrangement could also constitute an offence under the Crimes Act.

Example 4A: Development applications

Council staff from time to time lodge development applications with council. This may create problems, especially if the staff member works in the development assessment or planning areas of council.

In these circumstances there are a number of options that may be available to council to manage this situation:

- Council could outsource the assessment of the application
- A more senior member of staff could assess the application
- Council should restrict the staff member's access to information on the matter other than what they are entitled to as an ordinary applicant.

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Example 4B: Development applications

A council staff member receives a development application that contains an architectural style and colours about which she has strong personal negative views. The policy and standards that have been adopted by council do not preclude the style and colours. The staff member needs to objectively consider the policies and standards and not allow her personal views to affect her decision on the development application. If the staff member does not think she can objectively assess the application then she should declare a conflict of interests and arrange for another staff member to assess the application. Alternatively, council could arrange to outsource the assessment.

Example 5: Selection processes

Examples of appropriate action to resolve or avoid conflicts arising in job selection processes include:

- If an applicant is a personal friend, or past or present close work colleague of a member of an interview panel, that member should disclose the relationship to the other members of the panel (and in particular the independent member), at the time applications are reviewed.
- If a person is in a relationship with a party to a dispute or statutory application process over which they have to arbitrate, then that person should disclose the relationship to their supervisor or manager. Those duties should then be reallocated to another person who does not have a conflict.
- If a relative, personal friend or business partner has an interest in or may benefit from a tender, contract or application that a person is involved in the assessment or approval of, that person should disclose the relationship to their supervisor or manager. The person should then be removed from involvement in the process by reallocating those duties to another person who does not have a conflict.

Example 6A: Club membership

A councillor is a member of a club in a small community. The councillor is very active in the running of the club. While not an office holder, he is well known to all club members.

The club has recently submitted a development application to the council for a major extension of its facilities.

In this instance, there may be a public perception that the councillor's activities with the club would make it difficult for the councillor to view the matter before the council as a representative of residents and ratepayers generally. Therefore, the councillor should disclose his conflict of interests in the matter when it comes up for consideration. The councillor must then consider whether he should refrain from participating in council's discussion and voting on the matter. If the councillor decides not to vote then he should leave the room when the vote is being taken to ensure that the vote is not recorded in the negative.

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Example 6B: Club membership

A councillor is a member of a large metropolitan club. However, she is not active in the club or involved with the management of the club. In this situation, the councillor merely enjoys the facilities of the club as a privilege of membership.

In this example, should a matter relating to the club arise at council, it is appropriate that the councillor informs the council of her membership. However, it is unlikely that her interest as a club member would conflict with her role as a councillor representing the view of residents and ratepayers generally. Therefore, she could participate in the decision-making process.

In both situations, the councillors have two different interests in the matters. The first is their interest as a councillor representing residents and ratepayers generally; the second is as club members who are keen to see the club prosper and provide better facilities for its members. There is nothing wrong with a councillor having community as well as civic interests, though there are times when these interests may be perceived as a conflict of interests.

The distinguishing features of examples 6A and 6B are that:

- The councillor's interests as a club member in example 6A are likely to conflict with and influence his role as a representative of residents and ratepayers generally. This would make it difficult for him to be objective; and
- The public perception of a lack of impartiality would be stronger in the first example particularly given the size of the community and the visibility of the councillor in the club's activities.

If a councillor is an office holder in a club or other organisation, the interest may constitute a pecuniary interest.

Example 7: Lobbying on development decisions

A council comprising seven councillors is dealing with a rezoning proposal from a developer. The rezoning, if supported, will result in the value of the land in question increasing by several million dollars. The developer approaches four councillors in the week before the application comes before council and provides them with some written material and verbal argument in support of the rezoning. However, the material in question is not made available to the other three councillors nor is it submitted to council staff as material supporting the rezoning proposal. The proposal is opposed by groups in the community who have responded by way of written submission to council's public advertising of the application. These groups are also actively lobbying in support of their written submissions.

At the council meeting some councillors verbally refer to the information they have received from the applicant. However, this material is never tabled, is not put out for public comment, and is not subjected to analysis by council's professional staff. The submissions received from community groups are tabled, are analysed by council staff, and form part of the public record, which is available for scrutiny by any person.

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The four councillors who responded to the developer's lobbying without ensuring the material provided is formally submitted to council have shown poor judgement and invite suspicion of partial decision making. They should have advised the developer to formally submit the material to council and then require council to put it out for public comment. At the end of this process council professional staff would be able to provide, as part of open accountable processing of the application, an analysis of the developer's material and the public responses to it.

Although some delay would result in the processing of the application this delay is the direct result of the developer introducing new material into the issue. Lobbying in this matter has, in practical terms, introduced an element of preferential treatment and denied other stakeholders their right to also make submission on relevant material. The fact that only four councillors were provided with the material suggests a manipulative approach in the lobbying process, which should have been seen as such by the four councillors and firmly rejected.

The object lesson is that absolute compliance with the principles of ethical decision making is not optional...it is mandatory if council is to meet its charter of open, accountable decision making.

Suggested policy requirements

Councils' codes should be consistent with other policies that councils develop. Councils should consider developing policies that provide specific guidance on matters contained in the code of conduct. For example:

1. A specific policy on secondary employment.
2. Council's Code of Meeting Practice should provide examples of how to deal with conflict of interests situations that may arise in meetings.
3. A specific policy on managing private sector sponsorship.

Resources

ICAC/Department of Local Government, 1997, *Under Careful Consideration: Key Issues for Local Government*.

ICAC, 2002, *Taking the devil out of development: recommendations for statutory reform, position paper*.

NSW Ombudsman, 2003, *Fact sheet no 3, Conflict of Interests*.

NSW Ombudsman, 2003, *Good Conduct and Administrative Practice: Guidelines for state and local government*.

ICAC, *Practical Guide to Corruption Prevention*.

NSW Ombudsman, 2004, *Pre-requisites to avoid or manage conflict of interests*.

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7.3 Personal Benefit

Council officials, at some stage in their career may be offered a gift or benefit in the course of their work. The gift or benefit could be offered innocently in good faith or could be an attempt to influence. Feelings of obligation can arise if council officials accept a gift or benefit. Once such a gift is accepted, a council official can be compromised. Individuals attempting to corrupt council officials often start with small inducements that appear to have no improper motive behind them.

Corruptly receiving a gift or benefit is an offence under both the common law and NSW legislation. The offence extends to the offering or seeking of a gift or benefit.

Key legislation

- *Crimes Act 1900 (NSW), sections 249B and 249J*
- *Local Government (General) Regulation 1999, clauses 40E and 40F*

Model code provisions

See section 7 of The Model Code of Conduct for Local Councils in NSW.

Examples

Councils' codes should provide examples and/or case studies to illustrate the ethical problems that council officials might encounter and strategies for dealing with them. These guidelines include some examples to guide councils in developing their own examples relevant to their council's circumstances. Some additional case studies relating to gifts and benefits can be found at:

- Case studies/examples provided in ICAC publication – Gifts, Benefits or Just Plain Bribes?

Example 1: Gifts, benefits and hospitality

A regular supplier offers the council's purchasing officer a free weekend for two at a beach resort. The officer's impartiality when dealing with the supplier would be compromised if he or she accepts the offer.

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Planning and building staff are regularly offered alcohol, food, tickets to major sporting events and free lunches by developers, builders, project managers and suppliers. Staff sometimes accept these gifts without declaring them and argue that they are in return for providing good service and are an accepted way of "doing business". Again, this will be perceived to have compromised the impartiality of the staff concerned.

In this situation staff should, in the first instance, refuse any gift offered. If staff feel obliged to accept gifts, then they should declare the gift and have it recorded in council's gift register. Council may then determine how these gifts are dealt with and could, for example, donate specific items to charity.

Example 2: Acceptance of gifts and bribery

A local council employee is involved in a series of inspections on a building site. During the inspections, the developer offers the employee numerous gifts including alcohol and a present for the employee's new born child. The employee accepts the gifts as he feels they are offered as unconditional and genuine tokens of appreciation for his work, especially as the inspection involved a number of lengthy tasks.

The employee believes he is not compromised by the gifts and eventually makes a recommendation that is not in the developer's interests. After the recommendation is made, the developer complains to the council about the employee accepting the gifts.

Although the employee accepts the gifts in good faith, he nevertheless places himself in a vulnerable position. While each of the gifts is of modest value, when viewed in total, the value of the gifts seems quite substantial. The developer is able to manipulate the situation to allege the employee has accepted bribes.

The employee's acceptance of the gifts could also be used as circumstantial evidence of bribery. The employee could not rely on the fact that he made a decision he would have made, regardless of the gifts, as a defence to bribery.

Example 3: Acceptance of gifts and influence

A council's information technology manager attends two meetings with potential suppliers. During the first meeting the suppliers serve tea, coffee and biscuits. The second meeting is held at a restaurant and the suppliers pay for the manager's three course meal.

Both of the meetings arguably provide the manager's council with a benefit, namely the opportunity to discuss the supplier's products. Despite this, a contrast can be drawn between the meetings.

In the first, the refreshments are only modest in nature and consequently do not create the impression that an attempt is being made to gain the manager's favour.

In the second, the nature of the lunch creates the impression that an attempt is being made to compromise the manager's impartiality. The damage of this perception far outweighs any benefit associated with the manager's attendance.

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Suggested policy requirements

Councils' codes should be consistent with other policies that councils develop. Councils should consider developing policies that provide specific guidance on matters contained in the code of conduct. For example:

1. Councils may develop a policy and procedures to guide and assist council officials in dealing with gifts or benefits. This policy may provide an explanation of what constitutes token value and information on gift registers and the procedure for registering a gift or benefit. An explanation of how to develop a policy is contained in:
 2. Gifts, Benefits or Just Plain Bribes? – Guidelines for Public Sector Agencies and Officials, 1999, ICAC.
 - Councils may conduct regular reviews of gifts and benefits declarations to identify trends and any other issues. This should form part of the procedures developed by council.
 3. A hypothetical case study on the acceptance of gifts is provided in Chapter 4 of the ICAC Practical Guide to Corruption Prevention Manual and is a useful exercise to consider using in conjunction with training programs.

Resources

ICAC, June 1999, Gifts, *Benefits or Just Plain Bribes? Guidelines for Public Sector Agencies and Officials*.

ICAC, *Practical Guide to Corruption Prevention*.

7.4 Relationship between council officials

There needs to be personal interaction between councillors and senior council officers, particularly regarding access to and provision of information, to effectively integrate policy-making and service delivery. Councils need to develop a policy to provide guidance on the interactions between council officials. Councillors should avoid any perceptions of improper influence when exercising their role as an elected representative and interacting with staff.

Key legislation

- *Local Government Act 1993, Chapter 9 Part 2, Chapter 11, particularly section 352, and Chapter 12 Part 2 (these sections of the Act relate to how councils are established, how councils are staffed and how councils operate.)*
- *Local Government (Meetings) Regulation 1999*

Model code provisions

See section 8 of The Model Code of Conduct for Local Councils in NSW.

Optional better practice

Councils may wish to consider including in their codes and associated policies, the following information to assist council officials:

There are some questions council officials can ask to help decide whether or not contact between councillors and council staff is appropriate. A list of these questions can be found at:

- Councillors' access to information and their interaction with staff, page 23 Under Careful Consideration: Key Issues for Local Government, March 1997, ICAC/Department of Local Government.

Councillors and unions

Circumstances where it may be appropriate for councillors and unions to hold discussions include:

- competitive tendering policies
- industrial policies
- organisation structure
- management plans

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- EEO plans.

It is desirable that the general manager is kept informed about such contacts.

Examples

Councils' codes should provide examples and/or case studies to illustrate the ethical problems that council officials might encounter and strategies for dealing with them. These guidelines include some examples to guide councils in developing their own examples relevant to their council's circumstances.

Example 1: Attempting to improperly direct/influence staff

A councillor is a friend of a local surveyor who has a number of clients with development applications that are dealt with by council through its Development Approval Committee. Councillors rarely make decisions on development application matters. The councillor and surveyor often discuss the development applications currently being managed by the surveyor's agency. On many occasions the councillor rings the council staff member dealing with his friend's application to express a view on how it should be assessed. The councillor is often quite insistent that matters be dealt with more quickly. The staff members feel intimidated and pressured to support the applications.

The councillor believes that this action is appropriate as the councillor does not direct staff as to the outcome of the application assessment process.

Council staff are obliged to assess development applications in accordance with the applicable legislation. For example, section 79C of the Environmental Planning and Assessment Act 1979 provides a list of matters for consideration in determining a development application.

If the staff member feels intimidated or there are concerns about the propriety of the actions of a councillor, the staff member should advise the general manager. The general manager should intervene to stop the councillor from contacting staff members directly where this is inappropriate. The general manager should encourage staff to report such approaches.

Suggested policy requirements

Councils' codes should be consistent with other policies that councils develop. Councils should consider developing policies that provide specific guidance on matters contained in the code of conduct. For example:

1. Councils should develop more detailed policy and procedures to govern the interaction of staff and councillors. A model is provided in 'Under Careful Consideration: Key Issues for Local Government, 1997'.

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Resources

ICAC/Department of Local Government, 1997, *Under Careful Consideration: Key Issues for Local Government*.

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7.5 Access to information and council Resources

Councils should encourage public access to information about their activities. Any information and services that are publicly available should also be available to councillors. In addition, the council should provide councillors with access to a range of material to enable them to perform their role effectively.

It is important that the community has confidence that information acquired by the council will only be used for council purposes. Confidential information must only be used for council purposes. The *Privacy and Personal Information Protection Act 1998* ensures that where a public agency such as a council collects information about a person it does so in a manner that is transparent.

Key legislation

- *Local Government Act 1993, sections 11, 12, 13, 252, 664, 665 and 666 (these sections of the Act refer to access to information, what fees, expenses and facilities may be paid or provided to councillors and the disclosure and misuse of information.)*
- *Freedom of Information Act 1989*
- *Privacy and Personal Information Protection Act 1998*
- *Health Records and Information Privacy Act 2002*
- *State Records Act 1998*

Model code provisions

See section 9 of The Model Code of Conduct for Local Councils in NSW.

Optional better practice

Councils' codes should function as active guides to decision making. Codes of conduct will be more effective if they include information that assists council officials to understand and manage more difficult situations that may arise. Councils may wish to consider including these specific provisions in their codes of conduct.

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Contractors

Contracts with contractors, consultants, agents or advisers should specify that such persons are under an obligation not to use confidential information in ways which are an abuse of their role, function or position, or which put them in a position which is inconsistent with their legal and professional obligations to the council.

Business investments

You must avoid investments or business activities in relation to which your potential access to confidential information might reasonably be perceived as giving you an unfair or improper advantage over other people.

Examples

Councils' codes should provide examples and/or case studies to illustrate the ethical problems that council officials might encounter and strategies for dealing with them. These guidelines include some examples to guide councils in developing their own examples relevant to their council's circumstances.

Example 1: Use of council equipment

A local resident approaches a councillor with information about his neighbour, who is a council employee. He reports that the previous weekend he saw council equipment being used to dig up his neighbour's driveway.

The councillor reports the matter to the general manager. He discusses the matter with one of the council's internal auditors. The auditor decides to interview the employee, who has worked for council for 20 years and has an excellent work record. At the interview the employee admits that he used the equipment the previous weekend. He says he didn't realise it was wrong to do this as he was only 'borrowing' the equipment to do work on his own property. He did the work in his own time and not as a second job for which he got paid.

The auditor reports back to the general manager and, as this was a one-off offence, recommends that no formal disciplinary action be taken. In this case it would be appropriate if the general manager counsels the employee on the use of council resources and gives him a copy of council's code of conduct and policy. The council could also run a series of awareness-raising sessions for staff.

Example 2: Use of council information for personal or business interests

Many councillors have business and professional interests in the local government area they represent. Conflicts can arise if their public positions allow them access to information and opportunities that could be used to advance their personal and business interests.

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For example, a councillor may be tempted to influence an application to set up a new business in the town if his own business could lose custom as a result. The councillor should be careful to manage their personal interest openly and ethically to avoid any conflict in this situation.

Example 3: Forms of misuse

Forms of misuse which appear to be relatively common include:

- Staff utilising mobile phones excessively for private purposes without reimbursement of costs
- Internet services being used extensively for non-work purposes
- unauthorised use of minor plant or equipment
- “left-over” materials and low value assets being claimed by staff without payment or other proper arrangement being in place.

Example 4: Information security

A staff member goes to lunch leaving sensitive papers about a proposed industrial development on her desk. Another staff member sees the papers as he is returning some folders to her desk. He discusses what he has seen with other staff. One of the other staff members has previously notified that he has a conflict of interest in the development as he may be an objector to the development. His supervisor has been particularly careful to ensure that he did not have access to any information in relation to the development.

The staff member who was assessing the information should have known that the matter she is dealing with is sensitive and should have taken the necessary steps to secure the information before leaving her desk.

The staff member who saw the information should have maintained the confidentiality of the information and not discussed this with other staff members.

Suggested policy requirements

Councils' codes should be consistent with other policies that councils develop. Councils should consider developing policies that provide specific guidance on matters contained in the code of conduct. For example:

1. Councils should consider developing more detailed guidelines and policies on:
 - the procedures councillors should use to access council information
 - the use of council resources by council officials
 - the use of plant by council staff
 - the disposal of surplus minor assets

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- the use of communication devices (see clause 5 below).
2. The Privacy and Personal Information Protection Act 1998 provides obligations on councils, including the development of a privacy management plan. In addition, a Privacy Code of Practice for Local Government took effect from 1 July 2000 and councils must comply with this. A copy of this is available on the department's website at www.dlg.nsw.gov.au
 3. Councils should consider developing a policy, or modifying their Code of Meeting Practice, to provide procedures on the adequate and timely provision of information to councillors in relation to matters that they are dealing with. This policy should also provide procedures to keep council adequately informed of matters that may be the subject of negotiations and actions of committees of council under delegated authority.
 4. Councils should consider developing a policy that deals with the issue of councillor access to and use of
 - confidential information
 - commercial in confidence information
 - information on business competitors.Such a policy could be based on the information contained in the publications:
 - Good Conduct and Administrative Practice: Guidelines for state and local government
 - Under Careful Consideration: Key Issues for Local Government.
 5. Councils should require council officials to sign an agreement for the use of email and the internet. The ICAC publication '*No Excuse for Misuse*' provides a model policy for the use of communication and information devices in councils. Alternatively, councils can use the NSW Premier's Department 'Policy and Guidelines for use by Staff of Employer Communication Devices' as a guide. This document can be accessed on the Premier's Department website at www.premiers.nsw.gov.au

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6. Under section 252 of the Local Government Act 1993, council must adopt a policy concerning the payment of expenses incurred or to be incurred by, and the provision of facilities to, the mayor, the deputy mayor (if there is one) and the other councillors in relation to discharging the functions of civic office. Council's code of conduct and the section 252 policy should be consistent and referenced to each other.

Resources

Daly, M, Liverpool City Council Public Inquiry: Volume 3, July 2004.

ICAC/Department of Local Government, 1997, *Under Careful Consideration: Key Issues for Local Government*.

ICAC, 2002, *No Excuse for Misuse: preventing the misuse of council resources*.

NSW Ombudsman, 2003, *Good Conduct and Administrative Practice: Guidelines for state and local government*.

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7.6 Reporting breaches, complaint handling procedures and sanctions

Council officials are individually accountable for their acts and omissions in relation to their council duties. It is important that council officials clearly understand all of the requirements of their code of conduct as they may affect their work or civic responsibilities.

For a code of conduct to be effective and meaningful it must be supported with appropriate reporting of breaches and appropriate sanctions for breaches. Council officials need to have confidence that the code will be complied with and breaches will be dealt with appropriately. Breaches of a code of conduct by council officials may result in disciplinary action, legal action or in other sanctions being imposed, depending on the nature of the breach.

Key legislation

- *Local Government Act 1993*
- *Protected Disclosures Act 1994*
- *Independent Commission Against Corruption Act 1988*
- *Ombudsman Act 1974*

Model code provisions

See section 10 of The Model Code of Conduct for Local Councils in NSW.

Optional better practice

Councils may wish to consider including in their codes and associated policies, the following information to assist council officials:

Local Government Amendment (Discipline) Act 2004

The ICAC, Ombudsman and Director General retain the power to act on misbehaviour allegations including a breach of the council's code of conduct regardless of any council enquiries or finding.

Suggested policy requirements

Councils' codes should be consistent with other policies that councils develop. Councils should consider developing policies that provide specific guidance on matters contained in the code of conduct. For example:

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1. Councils should develop internal reporting procedures for dealing with allegations of breaches of the code. This information could be either included in the code of conduct or provided in a separate policy. The procedures should be consistent with internal reporting procedures under the Protected Disclosures Act.
2. Where council staff agreements do not provide for sanctions for breaches of the code of conduct, then council may consider including the following list of possible sanctions in its code of conduct:
 - counselling the staff member
 - documentation on the personnel file for a period of time depending on the nature of the breach of the code
 - disciplinary action such as demotion, foregoing the capacity to seek promotion, or to act in a higher duty capacity
 - dismissal from employment
 - reference to an appropriate investigative body
 - prosecution for any breach of law which could lead to dismissal and recovery of costs/damages suffered by council and/or imprisonment.
3. Councils should develop a policy and procedures on the reporting of corruption, maladministration and serious and substantial waste. A model policy can be found at:
 - Appendix 1/Annexure 1, Protected Disclosures Guidelines, 2002, NSW Ombudsman.
4. Councils should develop criteria to be used by conduct committees in assessing allegations of breaches of the code of conduct. These criteria should identify the factors that the committee must take into account in determining whether or not to enquire into an allegation.
5. Councils should develop guidelines for the operation of the conduct committee. The guidelines should identify that allegations of a pecuniary interest should be reported to the Director General of the Department of Local Government and will not be dealt with by the committee.

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Resources

NSW Ombudsman, 5th edn, 2004, *Protected Disclosures Guidelines*.

ICAC/Department of Local Government, 1997, *Under Careful Consideration: Key Issues for Local Government*.

NSW Ombudsman, 2nd edn, 2004, *The Complaint Handler's Toolkit*.

NSW Ombudsman, 2003, *Good Conduct and Administrative Practice: Guidelines for state and local government*.

NSW Ombudsman, 2004, *Investigating complaints: A manual for investigators*.

ICAC, 2003, *Fact-Finder, A 20-step guide to conducting an inquiry in your organisation*.

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8 Councillor Misbehaviour

The Model Code of Conduct for Local Councils in NSW links in with the misbehaviour provisions of the *Local Government Amendment (Discipline) Act 2004*. The Act requires every council to adopt a code of conduct that incorporates the provisions of The Model Code of Conduct for Local Councils in NSW. Councillors must comply with the applicable provisions of council's code of conduct.

The Act and the model code of conduct outline the sort of actions or omissions that will amount to misbehaviour by a councillor. This includes the failure to comply with applicable requirements of council's code of conduct, as well as acts of disorder that are committed during council or committee meetings.

Council is required to establish a conduct committee to enquire into and make recommendations on allegations of breaches of the code of conduct that are referred to the conduct committee. Councillors are expected to refrain from making allegations at council meetings and to report suspected breaches of the code of conduct to the general manager.

The model code of conduct provides for a council to impose sanctions for breach, including formal censure of a councillor for misbehaviour. However, this power should not be seen as a way of stifling proper process and debate at council meetings, nor of preventing minority representatives from putting forward their views on matters before council.

The Act requires that a motion for censure must follow the usual requirements for notice and to state the grounds on which the council is satisfied that the councillor should be censured. This should follow enquiries into the matter by council's conduct committee and the consideration of the conduct committee's findings and recommendations for action by council.

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If there are genuine grounds for action for misbehaviour, the Director General of the Department of Local Government will be able to suspend that councillor for a period of up to one month. For more serious behaviour the Director General will be able to refer the matter to the Local Government Pecuniary Interest and Disciplinary Tribunal.

Councils should ensure that they have complied with the procedures identified in section 440I(2) of the *Local Government Amendment (Discipline) Act 2004* before they refer a matter to the Director General. A council can refer a matter to the Director General only if it has already formally censured the councillor, on one or more occasions depending on the seriousness of the behaviour, or expelled the councillor from a meeting because of the relevant incident of misbehaviour. In its referral to the Director General council must provide the department with evidence that these requirements have been met together with a copy of any report of council's enquiries into the matter and all other relevant evidence.

Key legislation

- *Local Government Act 1993*
- *Local Government Amendment (Discipline) Act 2004*

Model code provisions

See section 11 of The Model Code of Conduct for Local Councils in NSW.

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9 Useful Resources

NSW Ombudsman publications:

Good Conduct and Administrative Practice: Guidelines for state and local government, August 2003.

Conflict of Interests: Public Sector Agencies fact sheet No 3, July 2003.

Protected Disclosures Guidelines, 5th Edition, 2004.

The Complaint Handler's Toolkit, 2nd Edition, 2004.

Website: www.ombo.nsw.gov.au

Independent Commission Against Corruption publications:

Taking the Devil Out of Development: recommendations for statutory reform, position paper, December 2002.

Practical Guide to Corruption Prevention.

Codes of Conduct: The next stage, March 2002.

Gifts, Benefits or Just Plain Bribes? Guidelines for Public Sector Agencies and Officials, June 1999.

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acknowledgements
1 purpose of these guidelines
2 introduction
3 statutory requirements
4 definitions
5 role of the code of conduct
6 development, implementation and review
7 topics to be addressed
8 councillor misbehaviour
9 useful resources

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