



Premier & Cabinet
Division of Local Government

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Department of Premier and Cabinet

Framework for Managing Councillor Misconduct Allegations

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INTRODUCTION

1. Objective of misconduct legislation

The statutory framework in Division 3 of Chapter 14 of the *Local Government Act 1993* (the Act) allows the prescription of a model code of conduct applicable to local councils in NSW. The purpose of the Model Code is to:

- assist council officials and the community to understand the standards of conduct that are expected of council officials.
- ensure council officials fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence.
- require council officials to act in a way that promotes public confidence in the integrity of local government.

Most breaches of a council's code of conduct are to be dealt with by the council at first instance. However the prescribed procedures for the administration of the Model Code require the referral of certain types of breaches to the Division of Local Government for action. It is also open to councils to refer serious misconduct to the Division after they have dealt with it under their code of conduct for the imposition of a stronger penalty than is available to the council under the procedures.

The Act authorises the Chief Executive, as Delegate of the Director General, to investigate allegations of misconduct against councillors and to take disciplinary action. It also allows the referral of matters to the Pecuniary Interest and Disciplinary Tribunal (PIDT) for consideration of stronger disciplinary action.

In exercising its functions under the misconduct provisions, the Division seeks to achieve the following key objectives:

- To be timely – to ensure that matters will be dealt with as expeditiously as possible,
- To be fair – to ensure procedural fairness by informing persons of the allegations against them and to provide them with an opportunity to comment on matters that are adverse to their rights and interests,
- To be rigorous – to ensure that all appropriate enquiries are made and that decisions are made on the basis of probative evidence and relevant considerations, and
- To be responsive – to ensure that disciplinary action is proportionate to the misconduct, addresses the cause and consequences of the misconduct and serves as an effective deterrent.

2. Purpose of this Framework

The purpose of the Framework is to identify:

- The basis on which the Chief Executive will make a decision in relation to an allegation of misconduct against a councillor.
- The factors that may be taken into consideration in deciding whether disciplinary action will be taken.
- The factors that may be taken into consideration in deciding which disciplinary action will be taken.

This Framework is to be considered by the Division when assessing allegations of misconduct against councillors. It provides guidance to inform decisions about investigations, departmental reports and disciplinary action.

This Framework reflects the current policies and practices of the Division. Those policies are kept under review and any changes will be notified publicly, generally by publication on the Division's website.

3. Key principles

Consistent with the above objectives, the Division is committed to ensuring that it exercises its role under the misconduct provisions of the Act in accordance with the statutory framework and the following key principles:

- **Timeliness:** Processes will be undertaken in a timely manner to the extent that this is possible having regard to the circumstances and complexity of a matter and the need for, and commitment to, natural justice principles. The goal is to deal with matters within 6 months of receiving an allegation.
- **Efficiency:** Decisions and the processes will have due regard to the need to ensure that appropriate public resources are directed towards achieving an outcome that is in the public interest.
- **Fairness:** Persons who are the subject of misconduct allegations will be treated fairly.
- **Restorative justice:** To the extent that it is possible and appropriate in a given circumstance, decisions and processes will seek to:
 - provide the opportunity for persons who have engaged in misconduct to make an early admission that they have engaged in misconduct
 - encourage such persons to publically apologise for their misconduct
 - encourage such persons to engage with persons who have been impacted upon by their conduct to bring about a restorative outcome.

4. What is misconduct?

Section 440F of the *Local Government Act 1993* provides the following definition of misconduct:

(1) *In this Division:*

Misconduct of a councillor means any of the following:

- a) a contravention by the councillor of this Act or the regulations,
- b) a failure by the councillor to comply with an applicable requirement of a code of conduct under section 440,
- c) a failure by a councillor to comply with an order issued by the Director-General under this Division,
- d) an act of disorder committed by the councillor at a meeting of the council or a committee of the council,

(2) *However, a contravention of the disclosure requirements of Part 2 is not misconduct.*

Note: *A contravention of the disclosure requirements of Part 2 is dealt with under other provisions of this Chapter.*

(3) *A reference in this Division to misconduct includes a reference to misconduct that consists of an omission or failure to do something.*

5. Delegated roles under the misconduct provisions

The legislation refers to the “Director-General” as exercising powers under the Act. The Chief Executive of the Division of Local Government, Department of Premier and Cabinet, is authorised to exercise the powers vested by the Act in the Director-General under a delegation.

The Chief Executive’s delegated powers include, but are not limited to:

- conducting an investigation,
- arranging for the preparation of a departmental report,
- making an order directing a relevant person to provide information or documents in accordance with section 440H(3) for the purposes of an investigation,
- taking disciplinary action if satisfied that the councillor has engaged in misconduct and that disciplinary action is warranted, and
- deciding to take no further action or referring a matter back to a council under section 440J
- referring a matter to the PIDT.

The Director General has delegated the conduct of investigations under the misconduct provisions of the Act, and the making of preliminary enquiries, to the Deputy Chief Executive, Manager, Investigations and Performance, the Leader, Investigations and Senior Investigators.

MISCONDUCT REQUESTS AND REFERRALS

6. What is a misconduct allegation?

A misconduct allegation is an allegation that a councillor has engaged in misconduct as defined by the Act (section 440F).

7. The Division’s involvement in assessing and determining misconduct matters

Section 440H(2) of the Act provides that the disciplinary process for misconduct is initiated by a referral made by a council or the general manager of a council, or on the Chief Executive’s own initiative, or on a report by the Ombudsman or the ICAC.

Any referral by an elected council must be supported by a resolution (section 440H(2)(c)).

The Division will also receive complaints from other sources (including members of the public, individual councillors and council staff) that allege a councillor has committed misconduct. These will be assessed to determine whether the disciplinary process should be formally commenced by the Chief Executive as an “own initiative” matter. In cases where, on assessment by the Division, such allegations can be dealt with under a council’s code of conduct, the complainant will be advised that a complaint should appropriately be made to the relevant council.

The disciplinary process can also be initiated on the basis of a report by the Ombudsman or the ICAC that states that the relevant agency is satisfied that a councillor has or may have engaged in misconduct (section 440H(2)(d) and (e)). However, the decision as to what action should be undertaken by the Division still rests with the Chief Executive. In practice it will be necessary for the Chief Executive to be satisfied that misconduct has occurred.

The Division has a direct role in dealing with specific types of matters. General managers of councils have an obligation to refer such matters to the Division for action instead of being dealt with by the council. These include:

- complaints alleging a breach of the pecuniary interest provisions of the Act (these will be managed in accordance with the pecuniary interest guidelines). (Clause 5.16a of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”*),
- complaints alleging a failure to comply with a requirement under the code of conduct to disclose and appropriately manage conflicts of interests arising from reportable political donations (general manager obligation pursuant to section 328B of the Act). (Clause 5.16b of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”*),
- complaints alleging a breach of Part 8 of the code of conduct relating to the maintenance and integrity of the code. (Clause 5.16c of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”*),
- complaints the subject of a special complaints management arrangement with the Division under clause 5.40 of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”* (the Division has an assessment role in these matters). (Clause 5.16d of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”*),
- complaints about the conduct of administrators and conduct reviewers, (Clauses 5.11 and 5.14 of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”*), and
- where a complainant councillor makes a complaint as a public interest disclosure and declines to consent to the disclosure of their identity as the complainant. (Clause 5.38 of the *“Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW”*).

7.1 Access to misconduct complaint and investigation information

Under Schedule 2 of the *Government Information (Public Access) Act 2009* (GIPA Act), information that relates to the complaint handling and investigative functions conferred on the Division by or under any Act is considered to be **excluded information**. Excluded information is information for which there is a conclusive presumption of an overriding public interest against disclosure.

Information relating to the management of misconduct allegations and matters, is **excluded information** for the purposes of the GIPA Act. As such, section 43 of that Act prevents an access application from being made to the Division for the **excluded information**.

HOW MISCONDUCT ALLEGATIONS ARE MANAGED

8. Assessment

Misconduct allegations will be assessed to determine whether:

- the complaint alleges conduct that, if proven, would constitute misconduct for the purposes of the Act,
- the matter is one that is more appropriately dealt with by the council under its code of conduct,
- the matter is one that would be more appropriately referred to another agency (eg ICAC),
- to conduct preliminary enquiries to inform an initial determination of the matter,
- to seek the authorisation of an investigation and the preparation of a departmental report in relation to the matter,
- to invite the subject person to put forward any matter relevant to a decision as to whether to undertake an investigation and preparation of a departmental report,
- to write to the councillor cautioning them about the matter, or
- to take no further action.

No action will generally be taken on an allegation unless the council has first been requested (in writing) by the complainant to act on the alleged misconduct and the council has either failed to do so in a reasonable time or has examined the alleged misconduct and failed to deal with the matter appropriately.

In determining whether a matter is one that warrants investigation, the Division will have regard to circumstances such as, but not limited to, the following, where:

- there is prima facie evidence of misconduct where the nature of conduct is such that if proven would warrant disciplinary action,
- further evidence needs to be adduced and a formal process is warranted to preserve the probative value of the evidence,
- the matter is one that cannot or should not be dealt with by a council under its code of conduct,
- the misconduct forms part of a pattern of misconduct,
- the council has not been able to effectively deal with the matter and the nature of the conduct warrants disciplinary action under the misconduct provisions,
- the matter relates to an alleged breach of Part 8 of the model code.

This assessment and a decision on taking one or more of the above actions should be made, where practicable, within 28 days of receiving the allegation:

8.1 Factors to be considered to determine whether to take further action

The Chief Executive is not obliged to act on every request for disciplinary action or in every instance where there is evidence of misconduct. In exercising a discretion not to pursue a matter, the Chief Executive's overriding obligation is to consider the public interest.

Factors that may be considered in assessing whether it is in the public interest to pursue a matter include, but are not limited to, the following:

1. The harm or potential harm to the reputation of local government and of the council concerned arising from the alleged misconduct.
2. Whether there have been repeated complaints/requests in relation to the conduct of the councillor.
3. The councillor's state of mind.
4. Whether the complaint falls into any of the following categories:
 - i. the complaint is frivolous, vexatious or not made in good faith,
 - ii. the subject-matter of the complaint is trivial or does not warrant investigation,
 - iii. the subject matter of the complaint has been or is under investigation by some other competent person or body or has been or is the subject of legal proceedings,
 - iv. the complainant raises issues that require investigation by another person or body,
 - v. there is or was, in relation to the matter complained of, a satisfactory alternative means of dealing with the matter by the complainant,
 - vi. the complaint relates to a matter that occurred more than 2 years before the complaint was made and the complainant has not provided a sufficient reason for having delayed the making of the complaint.
5. Any evidence of contrition or of other remedial action on the part of the councillor concerned in the period following the alleged misconduct.
6. The likelihood of an investigation eliciting sufficient evidence to prove the complaint (including the availability of witnesses and probative evidence and any admissions).
7. Whether the resources required to investigate a complaint would be disproportionate to the subject matter of the complaint.
8. The prevalence of the subject misconduct and the relative need or otherwise for deterrence.
9. Whether disciplinary action may act as a circuit breaker to prevent recurrent behaviour.
10. Whether the conduct should be referred to a more appropriate body for investigation (eg the Police or ICAC).
11. Where the complaint relates to a breach of either a supplemental or more onerous provision than that stipulated by the model code of conduct, whether such provision is considered to be a reasonable and appropriate standard in the circumstances.
12. Whether the person is a current councillor, although the misconduct provisions specifically allow for the investigation of former councillors (section 440N).
13. Any mitigating or aggravating matters.
14. The age, physical or mental health or special infirmity of the councillor or of any witness.
15. Prior decisions of the Tribunal.

9. Investigations and departmental reports

9.1 The investigation process

The Division may undertake preliminary enquiries to determine whether investigation of a matter is warranted (section 734A).

An investigation may be commenced in relation to a matter in consultation with the Chief Executive (section 440H(1)). The investigation should, where practicable, be commenced within

3 months of receipt of the allegation. An investigation plan will be used to guide the investigation process.

The Chief Executive may arrange for the preparation of a departmental report in relation to the investigation (section 440H(5)).

As a matter of procedural fairness, the person the subject of the complaint is to be advised of the investigation and the substance of the matters alleged at the outset of the investigation and invited to comment on the allegations. The subject person will be provided with not less than 14 days, or such additional time the Division considers to be reasonable and appropriate, to respond.

Orders may be issued to assist an investigation. Section 440H(3) provides that:

For the purposes of an investigation, the Director-General may, by order in writing served on any relevant person, direct the person to do any one or more of the following:

- a) provide written information, by the date specified in the order, and to verify the information by statutory declaration,*
- b) produce, at a time and place specified in the order, any document specified in the order that is in the person's custody or control.*

Note: *Failure to comply with the direction is an offence under section 661.*

This order will be served on the relevant person/s by registered mail or by other means agreed upon by the subject person and the Division. The person the subject of the order will be required to comply within the time specified in the order.

The Chief Executive may decide during or after an investigation into alleged misconduct to take no further action against the councillor if satisfied that no further action is warranted (section 440J(1)). The Chief Executive will notify the subject councillor of this decision.

9.2 Preparation of a draft departmental report

Under section 440I the preparation of a departmental report is a prerequisite to a decision by the Chief Executive to take disciplinary action against a councillor (except in the case of a report prepared by the ICAC or the Ombudsman).

As part of the investigative process, a draft departmental report that outlines preliminary findings and proposed recommendations is prepared. The draft report should, where practicable, be prepared within 28 days of the completion of the evidence gathering phase of the investigation. For more complex matters, more time may be required to draft the report.

The draft report will make a preliminary finding on whether the councillor has engaged in misconduct, and a proposed recommendation on whether any such misconduct warrants disciplinary action.

The Division will provide the draft report to the councillor who is the subject of the investigation for consideration and response. The subject person will be provided with not less than 14 days, or such additional time the Division considers to be reasonable and appropriate, to respond. It may also be necessary to provide other persons whose interests could be adversely and materially impacted upon by the report with the opportunity to make a submission.

9.3 Preparation of a final departmental report

The councillor's submission (and any other affected person's submission, if relevant) on the draft report is to be considered when preparing the final departmental report.

All submissions are to be attached to the final departmental report. The final departmental report should, where practicable, be provided to the Chief Executive for consideration within 21 days of the receipt of the councillor's submission.

MISCONDUCT DECISIONS

10. Findings and possible available action

Upon considering the final departmental report the Chief Executive will:

- make a finding on whether the councillor has engaged in misconduct, and
- determine to take one of the following actions:
 1. to take disciplinary action,
 2. to take no action
 3. to refer the matter back to the council, or
 4. to refer the matter to the PIDT, and
- provide reasons for the decision.

(Sections 440I and 440J)

Where the Chief Executive has found that a councillor has engaged in misconduct and determined that disciplinary action is warranted, the Chief Executive may take disciplinary action for misconduct, take no further action on the report, refer the matter to the council with recommendations as to how the council might resolve the matter, or refer the matter to the PIDT.

10.1 Take no further action or refer matter to the council

The Chief Executive may decide upon receipt of the departmental report to take no further action against the councillor, if satisfied that no further action is warranted. The Chief Executive will notify the subject councillor of this decision.

(Section 440J(1))

The Chief Executive may decide upon receipt of the departmental report, to refer the matter to the council concerned with recommendations as to how the council might resolve the matter, by alternative dispute resolution or otherwise. The Chief Executive will notify the subject councillor of this decision.

(Section 440J(2)(a))

10.2 Referral to the PIDT

A decision to refer a matter to the PIDT is available to the Chief Executive. The following considerations may inform that decision:

- the seriousness of the matter warrants the imposition of a period of suspension beyond that which is open to the Chief Executive; and/or

- the Chief Executive considers that it would be in the public interest for the matter to be subject to a hearing by the Tribunal; and/or
- where the Chief Executive considers the Tribunal is best placed to make a determination on the matter.

The Chief Executive is required to notify the councillor concerned where he decides to refer a matter to the PIDT (section 440J(4)). The councillor should, where practicable, be notified of the referral at the same time that the matter is referred to the PIDT.

10.3 Disciplinary action by Chief Executive

The following disciplinary action is available to the Chief Executive:

- counsel the councillor,
- reprimand the councillor,
- by order, direct the councillor to cease engaging in the misconduct,
- by order, direct the councillor to apologise for the misconduct in the manner specified in the order,
- by order, direct the councillor to undertake training,
- by order, direct the councillor to participate in mediation,
- by order, suspend the councillor from civic office for a period not exceeding 3 months,
- by order, suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 3 months (without suspending the councillor from civic office for that period). (section 440I).

The Chief Executive may determine to take a combination of disciplinary actions that are available. More than one direction may be stipulated in one order. The order will specify how the direction is to be implemented and by when.

Section 440I(7) provides a discretion to the Chief Executive to make the statement of reasons for disciplinary action publicly available for all disciplinary actions other than suspension or suspension of fees. The Chief Executive should make this decision at the time of determining the disciplinary action and advise the councillor of his/her intention to do so.

10.4 Factors to consider in deciding what disciplinary action to take

In determining what action to take, the Chief Executive may take into account any previous incidents of misconduct by the councillor, any previous disciplinary action against the councillor and any other relevant matters (section 440I(3)). In making this determination the Chief Executive may also have regard to the following:

- the seriousness of the breach,
- whether the breach can be easily remedied or rectified,
- whether the subject person has remedied or rectified their conduct,
- whether the subject person has expressed contrition,
- whether there were any mitigating circumstances,
- the age, physical or mental health or special infirmity of the subject person,
- whether the breach is technical or trivial only,
- whether the breach forms part of a pattern of conduct,
- the person's state of mind,

- the extent to which the breach has affected other parties or the council as a whole,
- the harm or potential harm to the reputation of the council or local government arising from the conduct,
- whether the findings and recommendations can be justified in terms of the public interest and would withstand public scrutiny,
- whether an educative approach would be appropriate,
- the relative costs and benefits of taking disciplinary action as opposed to taking no action or taking informal action,
- the public interest.

11. Consultation on disciplinary action

Where the Chief Executive determines that disciplinary action may be warranted, he will advise the subject councillor of this decision. The Chief Executive will provide the councillor with a copy of the final departmental report, the proposed disciplinary action and the reasons for the proposed decision. The Chief Executive should also seek the councillor's view on any proposal to make public the statement of reasons where disciplinary action other than suspension or the suspension of the councillor's fee is proposed.

The subject councillor will be invited to make a submission on the proposed disciplinary action. A period of not less than 14 days, or such additional time the Division considers to be reasonable and appropriate, will be provided to respond.

The councillor's submission on the proposed disciplinary action will be provided to the Chief Executive within 7 days of the receipt of the councillor's response.

12. Implementation of disciplinary action decisions

Section 440I(4) requires that the councillor is notified of any decision to take disciplinary action and the reasons for the decision.

12.1 Decision to suspend

Where the Chief Executive determines to suspend a councillor from civic office or to suspend a councillor's right to be paid any fee or other remuneration, the statement of reasons is to be provided to the councillor concerned and a copy provided to the council (section 440I(4) and (5)).

The councillor is notified by way of order which is to be served on the councillor, by way of registered post or otherwise as agreed. The order should be issued, where practicable, within 7 days of the Chief Executive's decision. The order will set out when the suspension is to take effect and the period of the suspension. The period of suspension under an order commences on the date 7 days after the service of the order on the councillor or the date specified in the order for the commencement of the period of suspension, whichever is the later (section 440K).

Section 440I(6) requires that the statement of reasons for the decision to suspend the councillor or suspend the councillor's right to be paid any fee or other remuneration is made publicly available. This will be done by way of publishing on the Division's website. This will be uploaded on the website within 48 hours of the order being served on the subject councillor.

12.2 Other disciplinary action

Where the Chief Executive determines to issue an order that directs a councillor to take certain action, then the order is served on the councillor by registered post or otherwise. The order should be issued, where practicable, within 7 days of the Chief Executive's decision. The order will set out the terms of what action is required by the councillor.

Section 440I(7) provides that the Chief Executive may make the statement of reasons for any other disciplinary action publicly available. The Chief Executive should make this decision when determining the matter. If the Chief Executive decides to make the statement of reasons public, this will be done by way of publishing on the Division's website. This will be uploaded on the website within 48 hours of the order being received by the subject councillor.

Where the Chief Executive determines to reprimand or counsel a councillor for misconduct this will be done by way of registered letter. The letter should be issued, where practicable, within 7 days of the Chief Executive's decision.

13. Monitoring implementation of disciplinary decisions

Where a councillor is ordered to take certain action, the councillor will be required within a specified time to provide evidence to the Chief Executive of the action taken. This requirement will be stipulated in the order.

Should a councillor not comply with an order, then the Chief Executive may determine to take further disciplinary action.

14. Managing councillor misconduct procedures flowchart

