

Councillor Conduct and Governance reform discussion paper

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INTRODUCTION

Purpose

This discussion paper sets out the current framework for dealing with councillor misconduct in Victoria and explores whether this system, put in place in 2009, is achieving its objective of raising standards of behaviour in the sector. The paper also considers other aspects of council governance, in particular the role of the mayor in overall governance issues including addressing conflict between councillors and the conduct of meetings.

The paper includes issues that have been identified by stakeholders that have arisen in the practical operation of the current councillor conduct regulation processes and seeks to stimulate discussion about how these problems can be addressed as well as identifying any others.

The objectives of the consultation process will be to:

- confirm whether the issues identified in this paper are problems that should be addressed;
- identify any other issues regarding councillor conduct that need to be addressed;
- identify more general governance issues impinging on the effective conduct of council business that could be improved (e.g. meeting procedures); and
- identify proposals for reform, including but not limited to, possible legislative changes.

Principles

Three principles will be followed in developing proposed changes to the current system:

1. council autonomy will be enhanced, not undermined;
2. any revised legislative framework will complement other initiatives being implemented to improve governance, accountability and integrity and ongoing efforts to improve sector capacity through non-legislative mechanisms; and
3. any revised system will be timely, accessible and proportionate.

Context

The objective is to have the State Government effectively support a professional, credible and high performing network of local councils across Victoria. Supporting high standards of councillor behaviour is one way of contributing to this goal. This can be done in a number of ways, including provision of guidelines, training support and capacity building. Legislation may be part of this broader suite of supports.

This consideration of councillor conduct and governance reform is occurring in the context of changes aimed at achieving higher levels of accountability in the public sector. This includes the establishment of the Independent Broad-based Anti-corruption Commission (IBAC) within the context of a broad integrity framework. While this paper relates only to the *Local Government Act 1989*, it is useful to note the wider framework in terms of the renewed focus on integrity in public office.

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The IBAC has jurisdiction to investigate complaints of serious corrupt conduct by public officers, including councillors.

The Local Government Investigations and Compliance Inspectorate is responsible for investigating councillors and others in relation to breaches of the Local Government Act, and prosecuting where offences are found. The Victorian Ombudsman investigates administrative actions of council staff under the *Ombudsman Act 1973*. The Ombudsman also has jurisdiction to investigate complaints made under the *Protected Disclosure Act 2012* (and its predecessor *Whistleblower Protection Act 2001*), relating to councillors and council staff.

These processes put in place a broad framework for dealing with the most serious allegations against individual councillors. However, there are many complaints which fall short of this level of seriousness but have the potential for significant impacts on a council's capacity. The conduct that is the focus of this discussion paper is behaviour that undermines good governance but is less than statutory breaches or offences.

Role of the Minister

The Minister for Local Government has significant powers to intervene in relation to serious systemic failures of governance within a council. In this regard, the minister can:

- appoint an Inspector of Municipal Administration to investigate or monitor a council (s.223A);
- appoint a Commission of Inquiry into serious systemic problems (s. 209); or

- suspend all councillors of a council (s.219) – this only applies in the gravest cases, where the council has demonstrated either a serious failure to provide good government, or unlawful action in a serious respect.

However, the minister has limited powers to actively intervene in relation to poor conduct by **individual** councillors. This is because it is not generally considered an appropriate role for the minister to assess internal disciplinary matters relating to individuals. There are significant risks attached to such involvement, including entanglement in local conflicts and personal behavioural issues. These matters are best dealt with by appropriate disciplinary processes.

Conduct failures which relate to breaches of the Act are investigated by Inspectors of Municipal Administration, who are appointed by the minister. But in relation to individual conduct matters which fall short of breaches of the Act, the minister does **not** generally have the power to intervene. The one exception to this rule is the power in relation to 'Calls of the Council' (s.85): where there is a failure to achieve a quorum due to the absence or departure of a group of councillors, a councillor or CEO may require all councillors to attend a 'Call of the Council' meeting. If a councillor fails to attend or remain at that meeting for a vote, leading to a failure to achieve a quorum, the minister may order that the councillor is incapable of remaining a councillor.

This contrasts with current proposals in New South Wales, where the *Local Government Amendment (Early Intervention) Bill 2013* provides for the minister to suspend a council for three months in circumstances including where councillor behaviour has impaired the 'proper or effective functioning of council'.

The limited information about what precisely is intended in New South Wales makes it difficult to assess whether this would in fact include individual councillor conduct falling short of a breach. If so, it would represent a stark contrast to the approach taken by successive Victorian governments towards the local government sector.

CURRENT COUNCILLOR CONDUCT FRAMEWORK IN VICTORIA

While there has always been sanctions against councillors in the Act, these have been for only the most serious types of breach. The first attempt to provide a legislative response to improving councillor behaviour that was lesser than breaches of the Act, but still unacceptable, was enacted in 2004. This required all councils to develop Codes of Conduct. It was expected that the process of developing codes would inform councillors of the standards of behaviour expected and therefore raise standards. The Act provided no enforcement mechanism.

The sector sought amendments to the Act providing for more guidance about what should be included in codes and for an enforcement mechanism. This led to the current framework which was enacted in 2008 following extensive consultation with councils and peak bodies.

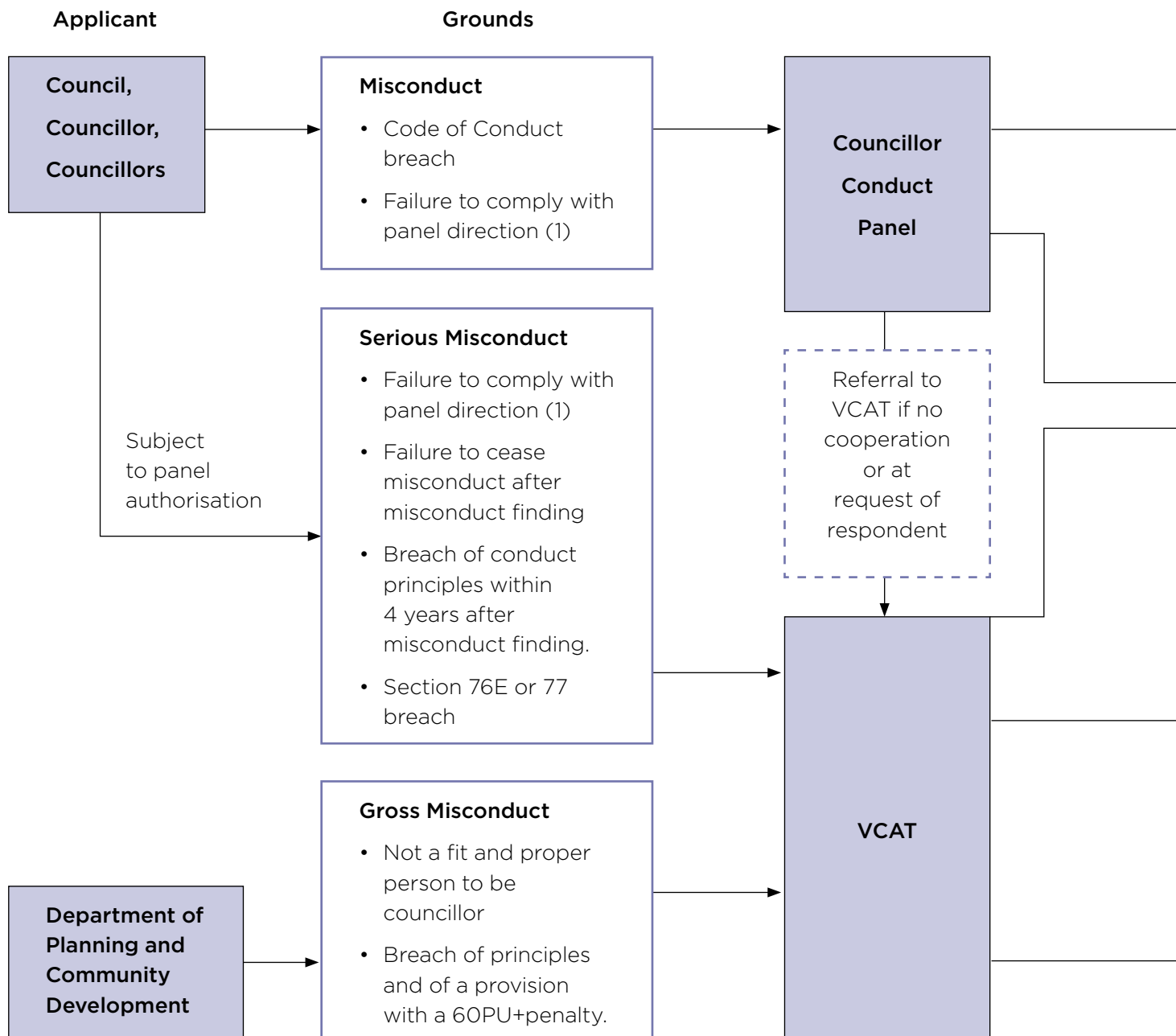
The framework includes section 76B that sets out a primary principle of councillor conduct and section 76BA that sets out general councillor conduct principles. These appear to be common sense provisions and self explanatory.

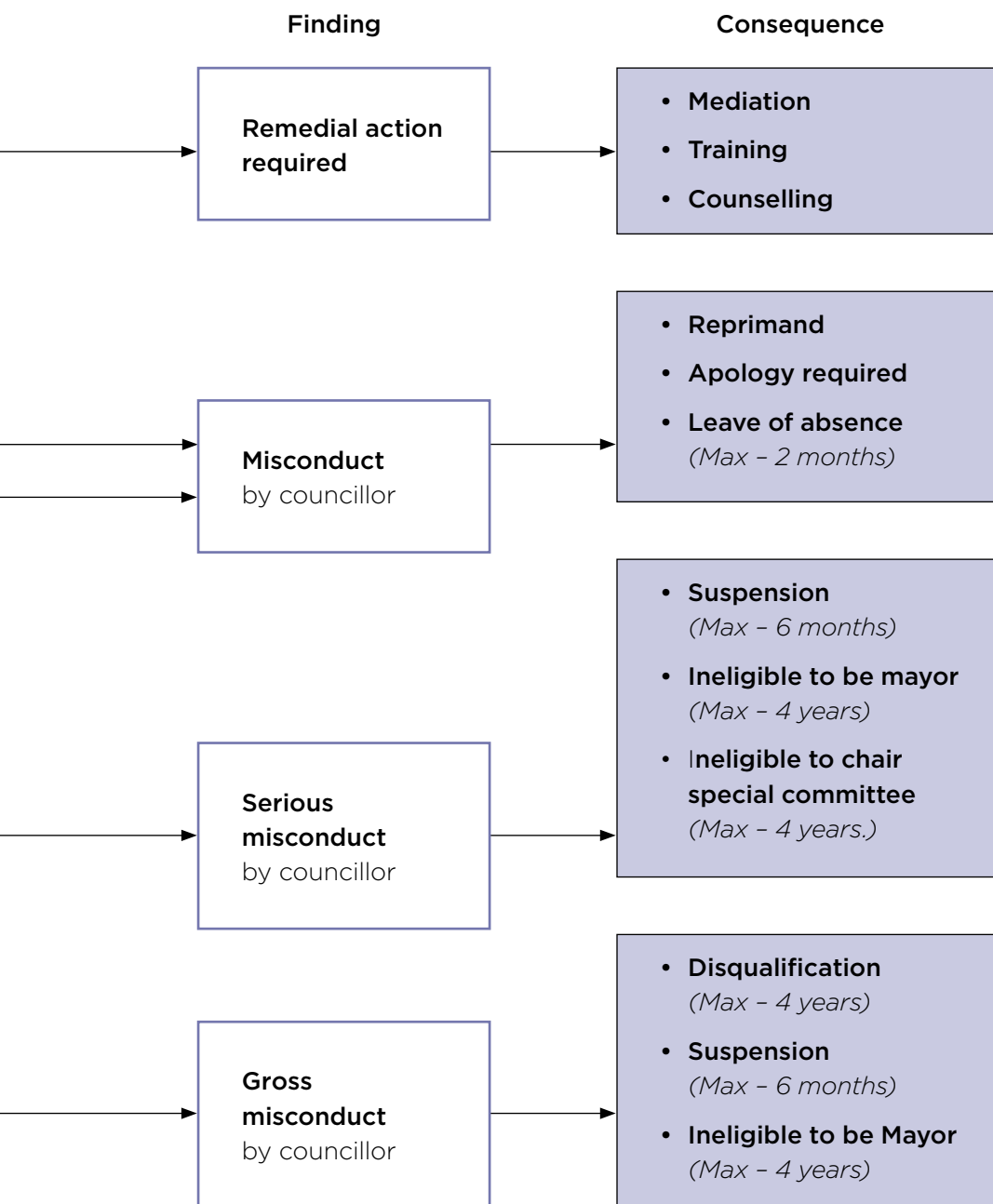
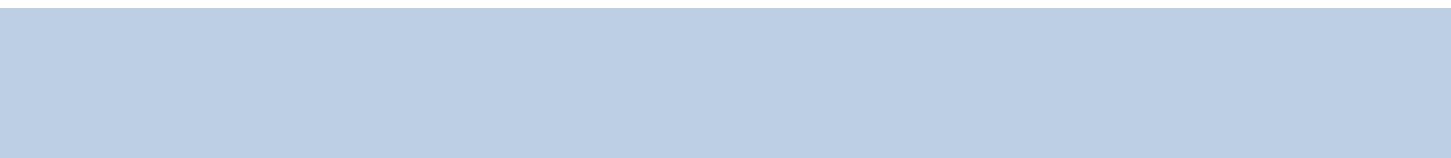
Secondly the framework provides for Councillor Conduct Panels to hear alleged breaches of council codes. The Municipal Association of Victoria is responsible for establishing panels when requested by either individual councillors, groups of councillors or a council. This reflects the desire to make the sector itself responsible for the system. These panels were intended to act as a relatively quick avenue for dispute resolution ordinarily without legal representation. Respondents also have a right to have complaints heard in VCAT if they wish the matter to be heard by the tribunal. Repeated breaches of a code by a councillor, ongoing misconduct after a panel finding of misconduct, or failure to comply with panel directions constitute serious misconduct and are dealt with by VCAT.

Panel and VCAT processes are distinct from other investigations and prosecutions by the Inspectorate, and actions taken in criminal or civil courts. Attached is a diagram illustrating how the current Councillor Code of Conduct processes work.

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CURRENT COUNCILLOR CONDUCT FRAMEWORK





EXPERIENCE OF THE CURRENT SYSTEM

COUNCILLOR CODES OF CONDUCT

Since 2009, all 79 Victorian councils have completed the process of drafting a Code of Conduct suitable to each council's circumstances. Most are now in the process, after elections in 2012, of reviewing and redrafting these codes as required under the Act. It is expected that the process of drafting and reviewing these codes will inform councillors about the standards of behavior that are expected of them.

Analysis of existing Councillor Codes of Conduct indicates significant similarity across the sector. A majority of councils use a similar structure in their codes, entailing principles and general obligations. This ensures that the various codes comply with section 76C of the Act.

Existing council codes usually specify the mayor as responsible for facilitating conduct and dispute resolution, including use of a mediator if required. This usually follows the failure to resolve a dispute informally. An alternate facilitator is often stipulated as a requirement if the mayor is involved in the dispute. Processes for how a complaint is to be handled and the setting of thresholds and triggers for escalation are uncommon in existing codes.

Sometimes disputes have quickly spilled outside the council. The media and other public avenues have then become venues for a dispute in the absence of a formal process of internal dispute resolution.

Transition to an external panel or other external intervention is more likely as a result.

A possible deficiency in current codes is the degree to which councils set out a formal procedure for addressing code of conduct breaches internally. Few councils have set out a formal procedure that provides for escalation and predictability. Few set in place formal requirements for a complainant to submit a complaint in writing or the process that then follows in how such a complaint is handled.

There is currently no data available on how many councils have dealt with breaches of their codes internally without recourse to a Panel Hearing, as this is not a reporting requirement.

COUNCILLOR CONDUCT PANELS

Between August 2009 and September 2012 there were 22 Councillor Conduct Panel hearings, involving 15 of Victoria's 79 Councils.

Just over a quarter (six) of the 22 panel hearings ended in a formal finding of misconduct. In these instances the most common sanction applied was an apology. This occurred in four cases (one councillor resigned rather than make an apology). Leave of absence from council (which means leave on full pay) was ordered in two cases, for one month and for two months respectively. Reprimands and orders for training and mentoring were also issued in a number of cases with or without other sanctions.

Six cases were dismissed, and in another six the respondents sought a referral to VCAT. In two cases panels authorised serious misconduct applications to VCAT.

A finding of behaviour less than misconduct was found in one case and the sanction imposed was a requirement to issue a clarification that there was no intent to disparage other councillors.

The most common matters dealt with related to disputes between councillors. This involved disrespectful or inappropriate conduct towards others, comments about, and bullying of others (12 cases). The next highest number of cases involved allegations of misconduct by councillors towards council staff, involving disrespectful or inappropriate conduct and bullying (five cases).

Other matters involved disclosure of confidential information (four cases), inappropriate conduct towards and false advice to residents (four cases) and misuse of council resources (three cases). There were single instances each of the following matters – misleading and deceptive conduct, use of false names, misuse of position, conflict of interest, failure to vote and failure to comply with a panel direction. Note some hearings involved more than one complaint so the numbers described above exceed the number of cases.

VICTORIAN CIVIL & ADMINISTRATIVE TRIBUNAL (VCAT)

Of the 22 panel hearings, 10 were referred to VCAT. Of these 10, three were withdrawn, three were settled, two lapsed when councillors were not re-elected and two have been adjourned to future dates.

Sanctions were applied following the three settlements overseen by VCAT, including apologies made by two councillors. In the third case, the councillor was required to take two months leave.

Attached at **Appendix 1** is a table summarising these panel and VCAT hearings.

COUNCILLOR CONDUCT FRAMEWORKS IN OTHER JURISDICTIONS

An overview of frameworks for dealing with councillor behavior in place in other Australian states reveals similarities and contrasts. **Attachment 2** provides a summary of the major elements of these arrangements. It is difficult to assess the gaps and problems in these other systems, or whether their experience has been better or worse than Victoria's in relation to delays, costs, outcomes etc.

However it is interesting to note that most have both panels and tribunals, of one kind or another. They all have a simpler categorisation of types of misconduct (though in practice this may not be as clear cut as it looks). Two states have not legislated to regulate any misconduct at all other than offences; in those, conduct matters falling short of an offence are dealt with by disciplinary panels.

Other differences to Victoria's framework are apparent. In the first place, the majority provide basic definitions of misconduct, primarily minor (breaches of Council's Code of Conduct) and serious (usually conduct which would constitute an offence). With regard to complaints hearing bodies, most states employ a two tier system, with a panel comprising a person or persons with specified expertise in local government matters, and appeal to a tribunal in certain cases. One state

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provides no right of appeal against panel decisions.

Where there are panels, these are allocated significant powers to apply disciplinary sanctions, including requiring a councillor to attend counselling, mediation or to make a public apology. In some states, where serious misconduct is covered, the sanctions of suspension or even disqualification for a limited period are available.

New South Wales has recently amended its legislation in order to give councils greater flexibility to informally resolve less serious matters and procedures to make a model code of conduct easier to understand and use. These changes provide larger penalties to help deter ongoing disruptive behavior and for investigation of all complaints against councillors (and CEOs) by an independent conduct reviewer. The Local Government Department has a number of options to directly manage administration of the code and address its misuse.

ISSUES

A range of issues have been identified with respect to each of the elements of the current framework.

In assessing whether, and if so what sort of, changes are required the central assumption is that councils should be supported to develop and maintain robust internal systems (including dispute settlement procedures through their codes of conduct) to address behavioural and misconduct issues.

Changes must not encourage councils or councillors unnecessarily seeking to have their internal conflicts referred to someone else to resolve.

PREVENTION

It has been suggested that ‘prevention is better than cure’ when it comes to conduct and behaviour issues. In particular some argue that there is insufficient understanding of, and guidance provided to candidates and new councillors about, the role of councillors and the likely expectations and workloads required of them.

There is little about the role of councillor in the Act. It is suggested that many conduct issues arise because councillors act outside the role intended by the Act. In particular problems arise when councillors inappropriately involve themselves in operational matters rather than the high level strategic priority setting and planning required of them. This information could be provided by way of training or guidance material.

Advice is sought on whether:

- the role of councillors should be set out in the code of conduct principles in the Act?
- guides should be developed and posted on the LGV website and circulated to all councillors early in their terms on the roles and expectations of councillors?
- training in the role of councillors should be mandated for all new councillors?

LEGISLATIVE PRINCIPLES

Section 76B of the Act sets out the primary principle of councillor conduct to act with integrity and impartially and to not improperly seek to confer advantage. Section 76BA sets out general councillor conduct principles that are to be included in all council codes of conduct. It has been suggested that the conduct principles themselves are not sufficiently understood by councillors because current guidance material is too focused on process and not the substance of the purpose of the framework and the principles it is seeking to foster.

Advice is sought:

- as to whether the primary and general conduct principles in the Acts are understood by councillors and council staff?
- as to whether these provisions assist in raising awareness of the standards of behaviour expected of councillors?
- what sort of additional guidance material would raise awareness and understanding?
- whether sanctions should be provided in the Act for councillors who breach these provisions?

COUNCILLOR CODES OF CONDUCT

It is difficult to determine how successful the process of developing and reviewing codes of conduct is in raising awareness of conduct issues and generally raising the standards of behaviour across the sector.

Advice is sought on:

- whether councils have found the process of developing and revising codes assists councillors to understand the behavior expected of them?
- whether councils find the requirement to draw on the primary and general councillor conduct principles contained in section 76BA the Act helpful or unhelpful?
- whether and if so, how often, councils have used dispute resolution processes in their codes?
- whether, if used, these procedures have resolved issues without recourse to panels?

The analysis of codes conducted indicates there is too little detail about processes in the majority of codes. Often the processes are unclear to councillors, for example, there is little detail about how complaints should be made or whether meetings are required to attempt to resolve issues. Without a documented procedure, internal processes are dependent on the discretion and negotiation skills of those involved. In all cases the handling of disputes between councillors requires the cooperation of all those involved.

There are benefits to providing discretion to the mayor and councillors to address disputes without setting an overly prescriptive process. There may however be a benefit in setting a clear and time bound process for resolving internal disputes.

There is arguably a need to take additional steps to ensure that internal dispute resolution processes are robust,

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transparent and function better in limiting the number of conduct issues requiring external processes (e.g. Councillor Conduct Panels).

It has been suggested that seeking a resolution of behavioural issues in meetings between councillors who are of equal status is unlikely to effectively address the problem. This may indicate councils could benefit from engaging an external, independent mediator at an early stage, to seek a resolution of issues between councillors. This would involve a cost to the council, but may be more effective in the long term.

Advice is sought on:

- how dispute resolution procedures in council codes could be improved?
- whether detailed dispute resolution procedures should be mandatory in council codes?
- whether these processes should include timelines for each step in the process?
- whether participation in these procedures be made mandatory with sanctions for non-compliance and lack of good faith?
- whether internal dispute procedures that involve, where appropriate, an independent mediator should be mandatory in codes?

COUNCILLOR CONDUCT PANELS

Vetting of complaints

It has been suggested that in some cases, panels have been sought for matters that would be more appropriately dealt with by internal council processes. It has also been suggested that at times complaints have been made for political purposes by political adversaries. Others

have suggested that conduct sometimes described as ‘bullying’ is merely robust political debate. It has also been suggested that these concerns are exacerbated by the capacity for single councillors or groups of councillors to make complaints and seek the establishment of a panel.

One way of addressing this may be to establish a ‘gatekeeper’ role under which an independent person evaluates complaints and directs them to the most appropriate forum. In considering this option, key questions would include where this role would sit in the wider framework, whether it would have statutory status and whether it would perform mediation or other functions.

Advice is sought on:

- whether a gatekeeper role of some sort should be established to vet the appropriateness of complaints?
- whether individual councillors or groups of councillors should be able to make complaints or whether all complaints should require a resolution of council before being considered?

Timeliness

It has also been suggested that the panel process is too long – both in the establishment of a panel to consider a matter and then in the conduct of the subsequent hearing. There are no timelines in the Act for either the establishment or finalisation of panel hearings.

The period between application and outcomes in panel hearings held to date varies between two and nine months. This is despite the intention that they be able to be established quickly and convened as soon as possible so that troublesome

behaviour can be addressed before becoming entrenched.

It has been suggested that the requirement for two panel members could be a factor in delaying panel proceedings. Single member panels may be more efficient, but may also be more open to appeals.

Advice is sought:

- on whether fixed timelines for the establishment of panels and conduct of hearings are necessary and, if so, what should they be?
- as to whether there should be a set number of appointees established who could be drawn on to form panels?
- on whether single member panels should be considered?

Panel processes

It has been suggested that the very act of taking a matter to a panel may exacerbate problems between councillors. This is because the panel process is adversarial. This can impact on working relationships as people take increasingly entrenched positions and other councillors are forced to choose 'sides'. Also, while legal representation was meant to be discouraged it has been suggested that panels use their discretion to allow such representation too readily.

There appears to be widespread misunderstanding about the processes engaged in by panels once they are convened. For instance people are unclear about:

- whether legal representation is allowed?
- who has standing to attend and to appeal decisions?

- whether complaints, proceedings and outcomes are confidential – noting that this can act to the detriment of a respondent who is not able to publicly defend themselves?

All of these matters are determined by the panel that is constituted to hear a matter. This is to provide maximum flexibility to a panel to hear the matter in the most appropriate manner. However it may give rise to a general lack of knowledge and confusion about how panels operate. It is important that the panels retain the flexibility to organise and conduct themselves in the most appropriate way to deal with the particular circumstances for which they are invoked. The success of the panel system in addressing misconduct allegations quickly and effectively depends on its responsiveness to the many and varied circumstances that councils face in enforcing their codes of conduct.

Advice is sought as to:

whether panel processes should be codified in some manner and, if so, what is the best method?

- how councillors and council staff can be better informed of these processes?
- whether specific conflict of interest rules (over and above section 79C(1)(j)) are needed regarding involvement of councillors who are subject to a complaint in council decisions about how the complaint is dealt with?
- whether respondents should be compelled to attend panel hearings?
- whether the requirement that panel decisions be tabled at council meetings (section 81M(2)) is understood and whether it should be continued?

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Councillor Conduct Panel Registrar

It has been alleged that the role of the Councillor Conduct Panel Registrar in providing material required for panels is often misunderstood, especially by respondents. Advice is sought on whether:

- greater clarity should be provided to councillors about this role?
- special protection for council staff fulfilling this role should be provided?

VICTORIAN CIVIL & ADMINISTRATIVE TRIBUNAL (VCAT)

There is concern timelines associated with VCAT hearings further exacerbate the successful resolution of misconduct matters. It has been suggested that cases at VCAT take too long to be heard and that there have been problems engaging VCAT members and hearing days for complex cases with many witnesses. In these circumstances minimising the number of matters referred to VCAT may be a key to having councillor conduct matters dealt with quickly.

VCAT was envisaged as dealing mainly with allegations of serious misconduct, however the Act also provides a right for a respondent to request a referral of their matter to VCAT. This, along with the previous right to have their costs met by the council (now amended) may have increased the number of inappropriately referred matters.

Amendments to the Act in 2012 that removed the automatic payment of costs by councils in these circumstances may reduce the referrals of these matters to VCAT. However respondents retain the right to request a referral to VCAT without first having a panel hear a matter.

Others have suggested an alternative

tribunal to VCAT be established in order to ensure a body of experience is built up regarding conduct matters. It has been suggested this could be a similar concept to VCAT, i.e. a judge (either current or retired) as chair, assisted by lay members with knowledge of local government. Such a proposal would require the approval of the Department of Justice, and it is noted that this would be unlikely given the longstanding policy of consolidating civil and administrative appeals functions.

Advice is sought as to:

- whether the right of respondents to request a VCAT hearing without a prior panel hearing should be removed?
- whether an alternative tribunal to VCAT be considered?

Further clarifying the definitions of misconduct, serious misconduct and gross misconduct and further refining the sanctions that apply in respect to each (dealt with below) might also help clarify the circumstances in which it is appropriate to have matters heard by VCAT.

Other courts

Further complexity arises when misconduct matters involve conduct that may also involve breaches of the Act. The latter are subject to investigation by the Local Government Investigations and Compliance Inspectorate and, where offences are found, potentially prosecution in the Magistrates Court.

Consideration should be given to ensuring that misconduct proceedings don't complicate prosecutions in other jurisdictions. Generally speaking, it is usual

for courts to take precedence, and for a disciplinary proceeding to be adjourned pending the conclusion of the court matter.

When the councillor code of conduct framework was introduced it was envisaged that the type of behaviour dealt with through the panel system and ultimately VCAT would involve conduct falling short of criminal behaviour.

However in relation to charges of gross misconduct at VCAT, the primary criteria for a positive finding requires a prior determination that a person has committed an offence under the Act.

Advice is sought on:

- whether courts dealing with prosecutions should be able to deal with all aspects of a matter, including imposing sanctions for disciplinary matters?
- whether the Act should specify that disciplinary sanctions (suspension from council, prohibition from holding certain positions) automatically apply to a councillor found by a court to have committed an offence under the Act?

DEFINITIONS AND SANCTIONS

Definitions of misconduct

It has been suggested that one means of lessening the complexity of the system is to review the definitions of '*misconduct*', '*serious misconduct*' and '*gross misconduct*' in the Act. There appears to be some confusion about the differences between these definitions and the inter-relationship between them.

Misconduct is meant to cover breaches of a Council Code of Conduct. Sanctions that can be applied by either a panel or VCAT following a finding of misconduct are to:

- reprimand a councillor;
- order that the councillor make an apology; or
- order that the councillor take leave of absence for up to two months.

Serious misconduct is meant to cover behaviour that is indicative of a deliberate flouting of the rules governing councillor conduct. This includes repeated instances of misconduct, failure to comply with a panel direction, failure to cease conduct after a finding that it constitutes misconduct, serious misconduct or gross misconduct or a contravention of section 76E (improper direction) or section 77 (confidential information). Sanctions that can be imposed by VCAT on a finding of serious misconduct are to:

- suspend a councillor for up to six months; or
- prohibit the councillor from holding the office of mayor or chairing a special committee for up to four years (and making the councillor ineligible to hold office of mayor for the remainder of a term).

Gross misconduct is meant to cover conduct that directly reflects on the character of the councillor and his or her fitness to hold public office. This requires either that a person has been found guilty of an offence in the Act (those carrying a penalty of at least 60 penalty units) or is not a good character or fit and proper person to hold the office. Sanctions that can be imposed by VCAT are:

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- disqualification for up to four years;
- suspension for up to six months; or
- prohibition from holding office of mayor for up to four years (and the remainder of a term).

Advice is sought on whether:

- legislative changes to the definitions are required?
- additional explanatory material is required to assist understanding of these definitions?
- given the high burden of proof required to successfully prosecute a case of gross misconduct, this category of misconduct be removed from the councillor conduct framework entirely?

Sanctions

The issue of appropriate sanctions for breaches of the councillor conduct provisions raises challenges of incentive, deterrence, proportionality, and enforcement. It is important that codes of conduct established by councils are able to be effectively enforced to provide an incentive for councillors to comply with the provisions (or a deterrence against breaching them).

Delays in having matters heard can make some of the sanctions described above ineffective. Reprimands and requirements for apologies can be ineffectual if the sanction is imposed many months after the event. In some cases a councillor's term of office has expired before the sanction is applied. However it should be noted that in most circumstances, requiring an apology of a publicly elected councillor can be an effective deterrent to misconduct.

As payments cannot be withheld from councillors during a period of leave of absence, this sanction has to some extent been regarded as ineffective. It is noted that the two month leave of absence has not been used extensively to date.

Advice is sought on whether:

- remedial action – mediation, training or counselling – has been useful in resolving misconduct disputes?
- the current sanctions – reprimands, apologies, two months leave of absence – are effective sanctions for misconduct?
- the sanctions for serious misconduct are a sufficient deterrent to repeated instances of misconduct?
- other sanctions should be considered?

It is noted that some potentially serious behaviour of councillors – leaking confidential information and attempting to direct council staff (sections 76E and 77) – constitutes a breach but not an offence. However these may be relevant to a finding of misuse of position, which is an offence. At the same time some conduct which may be seen as less serious – failure to lodge an interest return on time – constitutes an offence. It has been suggested that these three matters should be dealt with more consistently – either all in the councillor conduct framework, or all outside it.

Advice is sought on whether:

- penalties should be included in the Act for breach of sections 76E and 77?
- failure to lodge a return of interest under section 81 be made a disciplinary matter?
- the sanction for failure to lodge an interest return on time should be reviewed?

COSTS

Some councils have expressed concern about the costs incurred in relation to the code of conduct framework. This has been especially marked in relation to VCAT proceedings, but also in terms of time and resources of councils in dealing with matters. Amendments to the Act in 2012 may be effective in removing an incentive for respondent councillors to have matters referred to VCAT. However this will need to be monitored.

A related issue is who should bear the costs of complaints made by individual or groups of councillors where there has not been a council resolution authorising action. Another issue arises when a mayor is involved in proceedings, and given his or her position, is likely to have majority support in the council regarding any resolution regarding costs.

Advice is sought on:

- the extent of resources required of councils involved in panel hearings and whether these can be reduced?
- proposals regarding ways of reducing costs (in terms of time and resources) required of both councils and persons who are the subject of complaints?
- ways of ensuring individual councillors are not discouraged from using panel processes because of fear of liability for costs?
- ways of ensuring mayors with majority support in council can not automatically rely on council support for non-meritorious applications?

THE ROLE OF THE MAYOR AND CONDUCT OF MEETINGS

From time to time councils face difficulties in dealing with the conduct of business at council meetings. This may be due to the disruptive behaviour of one or more councillors, or it may be due to the behaviour of visitors in the public gallery.

Whilst there is some overlap between this issue and the broader councillor conduct framework, it is a specific problem that merits separate consideration. It has been suggested that mayors be given more powers to exclude people from meetings for specific periods. This power does not currently exist in the Act.

THE CURRENT FRAMEWORK

The only current and specific references in the Local Government Act 1989 to the role of mayor relate to how they are elected, their term of office, role as chair of all meetings of the council and mayoral allowances. Mayors are elected for a one or two year term. councillors are eligible to stand for more than one term as mayor.

The Act also sets out of the general framework governing council meetings. These must be open to the public as set out in section 89(1) of the Act. Section 89(2) provides an exception: a meeting may be closed to the public if council resolves to do so, for the purpose of discussing specified matters. These include personnel, industrial, contractual and security matters and consideration of legal advice.

Section 91 of the Act requires councils to make local laws governing the conduct of meetings. Normally local laws cover things like order of business, tabling of motions and how motions are dealt with and how public involvement, if any, will be facilitated at a meeting. Sometimes they include penalties or offences relating to the disruption of meetings.

Where a council meeting is subject to disruption by any person, whether a member of the public or a councillor, the chairperson may seek their removal by the police under Section 17 of the *Summary Offences Act 1966*. This applies to a person who, in the opinion of the chairperson, “behaves in a riotous, indecent, offensive, threatening or insulting manner or uses threatening, abusive, obscene, indecent or insulting words”.

ISSUES

The broader role of mayor

The mayor is commonly seen as the person who represents the council and is charged with speaking on behalf of the council as a whole, over and above his or her role as councillor. This is despite the Local Government Act 1989 identifying only three functions that differentiate the mayor from colleagues. These are: taking the chair at all meetings of the council, holding a casting vote where necessary and taking precedence at all municipal proceedings.

Mayors commonly find themselves called upon to consult, advise, mediate and in some circumstances, warn councillors, both individually and collectively, about conduct and governance issues.

Often mayors are called on to try to resolve issues before they escalate into formal disputes under the Councillor Code of Conduct. There is a question as to whether this role should be recognised more formally in legislation and if so how.

Advice is sought as to whether:

- a guide should be developed for mayors around their right/responsibility to ‘encourage, advise and warn’ councillors individually or collectively?

Role of the mayor in codes

Many councillor codes of conduct specify the mayor as the first port of call in resolving internal disputes. This can create difficulties should mayors themselves be involved in disputes. It is sensible for codes to specify that if a mayor is involved,

another councillor should be delegated to facilitate resolution of the dispute.

Advice is sought as to whether:

- special provisions in codes are required for circumstances where the mayor is involved in alleged breaches as either applicant or respondent?

Disorderly conduct by councillors

A key challenge for mayors in chairing council meetings can occur when disorderly conduct by one or more councillors becomes seriously disruptive. This behaviour can be less than the type of misconduct that is covered by a code of conduct. Whilst local laws are meant to provide a framework for addressing most issues that arise during meetings, including disruptive behaviour, it has been argued this is not always sufficient.

If the mayor is given the power to remove a democratically elected councillor from a meeting various issues need to be considered. First, whether the type of conduct that may trigger a removal process should be defined or left to the discretion of the mayor. Secondly, a removal process needs to be established that is clear and transparent.

The option of giving a mayor powers over other councillors is unusual. Unlike the Speaker in a Parliament, a mayor does not normally stand aside from the deliberations of the council (unless he or she has a conflict of interest in a matter). Instead, he or she has the right to vote on all issues before the meeting (with an additional casting vote in the event of a tied vote).

In these circumstances giving the mayor powers to warn and ultimately eject councillors from a meeting in a similar manner to a Parliamentary Speaker is problematic. However, if it was decided that it would be effective in addressing the issue of disorderly conduct, safeguards could be considered to avoid abuse of the power.

It has been suggested that the mayor could be given a limited power, such as to move a motion that a councillor be required to leave the meeting for a specified time. If the motion is passed by majority vote of the council, the councillor would be required to leave the meeting for the designated period. This process appears more in keeping with the role of the mayor and could help address any real or perceived bias issues.

Having a process to remove a councillor will be meaningless unless there is a consequence for a councillor failing to leave when directed. Options might include referring the councillor to an independent mediation process, or to a Councillor Conduct Panel.

Of these options the panel approach is consistent with the overall conduct framework. It would be hoped that if this was the process adopted the Panel system would not become overloaded with these sorts of cases.

Councillor Conduct and Governance reform discussion paper

Advice is sought as to:

- whether mayors should be given the ability to eject unruly councillors from Council meetings?
- if so, whether the process for doing so should reflect the processes used by a Speaker in a Parliament notwithstanding differences in the role of mayor?
- whether such a decision should require a resolution of council?
- whether 'disorderly conduct' should be defined?
- whether a process for ejecting disorderly councillors should be set out in model local laws that could be adopted by councils on a voluntary basis?

Disruption of meetings by members of the public

Another issue that arises from time to time is the disruption of council meetings by members of the public. Isolated incidents involving members of the public who are critical of specific decisions are part of the democratic process and do not generally disrupt the orderly conduct of council business. However there have been examples of sustained campaigns organised by groups with the express purpose of undermining the orderly conduct of business by councils. The powers provided in the Summary Offences Act (see above) are one means of addressing this issue, but there may be other options which do not require the attendance of police, itself a potentially disruptive process.

In these circumstances advice is sought as to whether:

- the Act should be amended to provide that in exceptional circumstances council meetings can be closed to the public?
- exceptional circumstances should be defined to mean when members of the public set out deliberately to disrupt the orderly conduct of council proceedings?
- councils should be empowered to exclude named members of the public from council meetings?
- the grounds for excluding such members of the public should be that they are intent upon disrupting the orderly conduct of council proceedings?

CONCLUSION

Consultation on the matters contained in this discussion paper is open until close of business, Wednesday 31 July 2013.

Submissions can be made to:

jeremy.frampton@dpcd.vic.gov.au. Please provide your name and contact details on your submission.

Confidentiality

All submissions are public documents unless otherwise specified by the submitter.

Please indicate in your submission whether you wish your name, contact details or any part of your submission to be kept confidential.

Councillor Conduct Panels

Attachment 1

Application			Panel Outcome		VCAT
Date	Parties	Matter	Date	Decision	
Aug 09	Councillor (Respondent) Council (Applicant)	Disclosure of confidential information	16/11/09	Misconduct finding - Reprimand, apology, media training and mentoring program	-
Feb 10	Councillor Councillors (3) (A)	Misleading and deceptive conduct	Nov 10	Misconduct finding - apology (not made) - Respondent resigned - Respondent appeal to VCAT	Withdrawn by Respondent - Nov 11
May 10	Councillor (R) Councillor (A)	Disrespectful/ inappropriate conduct towards other councillor/s	10/8/10	Application dismissed	-
May 10	Councillor (R) Councillor (Mayor) (A)	False advice to ratepayer	16/8/10	Application dismissed	-
Jul 10	Councillor (R) Council (A)	Various matters – details withheld. May relate to conflicts of interest	-	Respondent requested referral to VCAT	Withdrawn by Council.
Jul 10	Councillor (R) Councillor (A)	Disrespectful/ inappropriate conduct towards other councillor/s	13/12/10	Misconduct finding - reprimand, training and mentoring	-
Sep 10	Councillor (R) Council (A)	Inappropriate comments about other councillors (to media)	16/05/11	Application dismissed	-
Dec 10	Councillor (R) Council (A)	Use of false names	Mar 11	Application dismissed	-
Feb 11	Councillor (R) Councillor (A)	Bullying/ harassment of other Crs Inappropriate comments about other councillors (to media)	-	Respondent requested referral to VCAT	Withdrawn by agreement between parties.
Feb 11	Councillor (R) Council (A)	Refusal to return council equipment	-	Respondent requested referral to VCAT	Settled. Matter withdrawn and apology made.

Councillor Conduct Panels

Application			Panel Outcome		VCAT
Date	Parties	Matter	Date	Decision	
Feb 11	Councillor (R) Council (A)	Refusal to return Council equipment	-	Respondent requested referral to VCAT	Settled. Matter withdrawn and apology made.
Jun 11	Councillor (R) Councillor (A)	Disrespectful/ inappropriate conduct towards resident/ ratepayer	25/08/11	Misconduct finding - Apologies	-
	Councillor (R) Councillor (A)	Misuse of council email	25/08/11	Application dismissed	-
May 11	Councillor (R) Council (A)	Disclosure of confidential information	28/09/11	Misconduct finding - apology, mentoring and 1 month leave	-
May 11	Councillor (R) Council (A)	Disclosure of confidential information	28/09/11	Authorised serious misconduct application to VCAT	Matter settled. Serious misconduct with 2 months leave.
Nov 11	Councillor (R) Councillor (A)	Failure to comply with Panel Directions (August panel - ordered apology to resident and attend counselling - Councillor failed to offer adequate apology)	-	Respondent requested referral to VCAT	Adjourned to March 2013
Dec 11	Councillor (R) Councillor (A)	Disrespectful/inappropriate conduct towards resident/ ratepayer	20/3/12	Application dismissed	-
Dec 11	Councillor (R) Councillor (A)	Failure to vote; Disrespectful/inappropriate conduct towards resident/ ratepayer	9/2/12	Withdrawn by applicant	-

Councillor Conduct Panels

Application			Panel Outcome		VCAT
Date	Parties	Matter	Date	Decision	
Nov 11	Councillor (R) Council (A)	Multiple breaches including: - Bullying/harassment of staff - Misuse of position	-	Respondent requested referral to VCAT	- Proceeding lapsed 27 October 2012 - Respondent not re-elected
Dec 11	Councillor (R) Councillors (6) (A)	Multiple breaches including: - Bullying/harassment of staff - Bullying/ harassment of other councillors - Misuse of position, - Disrespectful/inappropriate conduct towards other councillor/s - Disrespectful/inappropriate conduct towards staff	7/3/12	Authorised serious misconduct application to VCAT	VCAT Adjourned until 2013
Feb 12	Councillor (R) Council (A)	Various (18 matters) inc: - Disrespectful/inappropriate conduct towards other councillors - Bullying/harassment of other councillors - Bullying/harassment of staff - Disclosure of confidential information - Disrespectful/inappropriate conduct towards other councillors - Disrespectful/inappropriate conduct towards staff	18/9/12	Misconduct finding: - Bullying of former councillor - Foul inappropriate language - Harassment and bullying of CEO Required to take leave of absence for 2 months from 18/9. Required to complete course on councillor responsibilities.	Referred 2 matters for serious misconduct: - Disclosure of commercial in confidence information; - Disclosure of commercially sensitive information. Lapsed - Respondent not re-elected 27 October 2012

Councillor Conduct Panels

Application			Panel Outcome		VCAT
Date	Parties	Matter	Date	Decision	
Sep 12	Councillor (R) Councillor (A)	Misconduct: - Disrespectful/inappropriate conduct towards other councillor/s - Inappropriate comments about other councillors (including to media)	21/9/12	Finding: The 'imprudent' conduct did not amount to misconduct. However remedial action required: make a statement to council that he did not intend disparagement of the councillors and did not impugn their commitment to the community. To be published if council approved.	-

Comparison of Australian Councillor Conduct Models

Attachment 2

	QLD	NSW	SA	WA	TAS
Misconduct types	<p>Misconduct Not honest and impartial</p> <p>Inappropriate conduct – Means conduct other than misconduct – lesser misconduct</p> <p>Official misconduct – Misconduct which would also be a criminal offence</p>	<p>Serious corrupt Failure to disclose pecuniary interest</p> <p>Misconduct – breach of Act or regulations, failure to comply with code, disorderly conduct at meeting</p>	<p>No definition of misconduct – reference only to conduct which constitutes offence such as: Improper use of information Misuse of position Failure to disclose interest; false or misleading information re interest, Etc.</p> <p>General conduct duties are – honesty, reasonable care and diligence.</p>	<p>Minor breach – breach of conduct rule; or of certain local laws</p> <p>Recurrent breach – 2 or more minor breaches</p> <p>Serious breach – offence under a law which expressly applies to councillors</p>	Breach of code

Comparison of Australian Councillor Conduct Models

	QLD	NSW	SA	WA	TAS
Complaint hearing bodies	<p>(1) Mayor – inappropriate conduct by councillor</p> <p>(2) Chief Executive Dept – inappropriate conduct by mayor or deputy; misconduct. Can refer on if serious:</p> <p>(3) Panel – Regional Conduct Review Panel – (serious) misconduct and official misconduct</p> <p>(4) Tribunal – LG Remuneration and Discipline Tribunal – (serious) misconduct and official misconduct</p> <p>(5) Crime and Misconduct Commission – official misconduct (may refer back to (3) or (4))</p>	<p>Director General of Department – may deal with, or refer to</p> <p>Pecuniary Interest and Disciplinary Tribunal</p>	<p>Local Government Governance Panel</p> <p>Panel – is not a statutory body, has no enforcement powers.</p> <p>Is constituted by LG Association – advisory only i.e. advises councils about dealing with complaints.</p> <p>Does not receive complaints from public, nor does it assess matters involving fraud etc.</p>	<p>Local Government Standards Panel</p> <p>Established under Act by Minister.</p> <p>Recurrent – Panel may send to Department CEO</p> <p>Department CEO can refer recurrent or serious breach to</p> <p>State Administrative Tribunal (similar to VCAT)</p>	<p>Code of Conduct Panel – convened by the council receiving the complaint.</p> <p>Standards Panel – convened by the Local Government Association of Tasmania, independent of council</p>

Comparison of Australian Councillor Conduct Models

	QLD	NSW	SA	WA	TAS
Sanctions	<p>Disciplinary sanctions, including:</p> <p>Panel</p> <ul style="list-style-type: none"> • Counselling • Required to apologise • Mediation • Reimburse council • Pay no more than 50 penalty units. <p>Tribunal</p> <ul style="list-style-type: none"> • Counselling • Required to apologise • Mediation • Forfeit an allowance, benefit or payment • Reimburse council • Suspension for specified period 	<p>Director General</p> <ul style="list-style-type: none"> • Suspension <p>Tribunal</p> <ul style="list-style-type: none"> • Can hear appeal against Director General suspension ruling <p>If finds misconduct, can order:</p> <ul style="list-style-type: none"> • Counselling • Reprimand • Suspension • Disqualification (not > 5 years) • Suspend remuneration 	None. Advisory only.	<p>Panel may order:</p> <ul style="list-style-type: none"> • Public censure • Make apology • Undertake training • Combination of above. <p>Tribunal may order:</p> <ul style="list-style-type: none"> • Public censure • Apology • Undertake training • Suspension for not > 6 months • Disqualification for not > 5 years • Combination of above. 	<p>Code of Conduct Panel may order:</p> <ul style="list-style-type: none"> • Caution; • Reprimand; • Apology • Attend counselling or a training course; or combination. <p>Standards Panel may make same types of order.</p>
Appeal	None expressly excluded.	<p>From Director General – to tribunal</p> <p>From tribunal – to Supreme Court</p>	N/A. Advisory only	Of Panel decision to State Administrative Tribunal	Of Code of Conduct Panel decision – to Standards Panel

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