



New South Wales

Local Government Amendment (Conduct) Bill 2012

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Local Government Act 1993* as follows:

- (a) to authorise the Director-General of the Department of Premier and Cabinet (the **Director-General**) to conduct an investigation to determine whether a councillor has engaged in misconduct and to enable the Director-General to require a councillor or a council staff member, delegate or administrator to provide information or documents for the purpose of such an investigation,
- (b) to enable the Director-General to take a range of disciplinary action against a councillor found to have engaged in misconduct, including counselling or reprimanding the councillor, issuing an order directing the councillor to apologise for the misconduct or to participate in training or mediation, and suspending the councillor, or the councillor's right to be paid, for up to 3 months,
- (c) to enable a decision by the Director-General to take disciplinary action to be made public,

- (d) to provide that a failure by a councillor to comply with an order issued by the Director-General in relation to an investigation or as part of disciplinary action constitutes misconduct by the councillor,
- (e) to enable the Local Government Pecuniary Interest and Disciplinary Tribunal (the ***Tribunal***) to disqualify a councillor found to have engaged in misconduct from holding civic office for up to 5 years,
- (f) to require administrators of councils to comply with the code of conduct applicable to councillors and to enable the Director-General to investigate allegations of misconduct by administrators,
- (g) to enable the Director-General to investigate allegations of misconduct by former councillors and to refer such matters to the Tribunal for consideration and to make it clear that the Tribunal has power to deal with matters relating to former councillors,
- (h) to provide that the regulations may prescribe a procedure for administering the code of conduct and dealing with alleged contraventions of the code (which will be mandatory for councillors, members of staff, delegates of a council and administrators of a council),
- (i) to enable council meetings at which allegations of misconduct by councillors are discussed to be closed to the public,
- (j) to make other minor miscellaneous amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Local Government Act 1993 No 30

Misconduct of councillors

Schedule 1 [12] inserts new provisions relating to misconduct by councillors, the investigation by the Director-General of allegations of misconduct and the taking of disciplinary action by the Director-General against councillors found to have engaged in misconduct.

Misconduct (previously referred to as misbehaviour) includes a contravention of the *Local Government Act 1993* or the regulations under that Act, a failure by a councillor to comply with an applicable requirement of the code of conduct (which is a code adopted by a council based on a model prescribed by the regulations) and a failure by a councillor to comply with any order issued by the Director-General in relation to a misconduct investigation or issued as a form of disciplinary action.

At present, the Director-General may only initiate proceedings for the suspension of a councillor on limited grounds and in limited circumstances and may take no other disciplinary action. Under the new provisions, the Director-General may conduct an investigation for the purpose of determining whether a councillor has engaged in misconduct. For the purpose of the investigation, the Director-General may order a councillor or a council staff member, delegate or administrator to provide information or documents and may arrange for a departmental report to be prepared in relation to the investigation.

The Director-General will have broad powers to take disciplinary action against a councillor if satisfied that the councillor has engaged in misconduct and that disciplinary action is warranted. The Director-General will be able to counsel or reprimand a councillor and issue various orders requiring the councillor to cease engaging in the misconduct, apologise for the misconduct or participate in training or mediation. The Director-General will also continue to be able to suspend a councillor, and to suspend the councillor's right to be paid, but the period for which a suspension may be imposed is increased from 1 month to 3 months.

In determining which disciplinary action, if any, to take against a councillor who has engaged in misconduct, the Director-General may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.

The Director-General is required to make any decision to suspend a councillor from civic office or to suspend a councillor's right to be paid publicly available and may make decisions to take other forms of disciplinary action publicly available. There is no liability for defamation in respect of such publication.

The Director-General may, instead of taking disciplinary action, decide to refer the matter to the council concerned with recommendations as to how the council might resolve the matter. The Director-General may also refer the matter to the Tribunal for consideration.

A councillor against whom disciplinary action is taken by the Director-General may appeal to the Tribunal within 28 days.

The Director-General may conduct an investigation for the purpose of determining whether an administrator of a council has engaged in misconduct.

The Director-General may also investigate allegations of misconduct by former councillors and may refer such matters to the Tribunal for consideration.

Existing provisions that provide that a council may by resolution at a meeting formally censure a councillor for misconduct and that provide for the recovery from a council of reasonable expenses incurred by the Department of Premier and Cabinet in the conduct of an investigation into a councillor at that council are retained.

Schedule 1 [4], [6]–[8], [13]–[15] and [19]–[21] are consequential amendments.

Administration of code of conduct

Schedule 1 [11] provides that the regulations may prescribe a model procedure for administering the model code of conduct, which will set out the procedure for dealing

with alleged contraventions of the code of conduct. A council must adopt a procedure based on the model procedure. Councillors, members of staff, delegates of a council and administrators of a council must comply with the adopted procedure. However, contravention of the procedure will not constitute misconduct.

Conduct of administrators

Schedule 1 [9] and [10] provide that the requirements imposed on councillors, members of staff of councils and delegates of councils to act honestly and with care and diligence and to comply with the code of conduct also apply to administrators of councils (other than administrators appointed to exercise the functions of a council in relation to water supply, sewerage and stormwater drainage).

Local Government Pecuniary Interest and Disciplinary Tribunal

Schedule 1 [16] and [18] make it clear that the Tribunal has the power to take action against a former councillor in matters involving complaints relating to the non-disclosure of pecuniary interests and misconduct matters. The Tribunal will also be able to take into account previous pecuniary interest complaints proved against a councillor (or council employee, advisor or member of a council committee), previous incidents of misconduct by a councillor and any previous action taken against the person in determining which, if any, disciplinary action to take against the person.

Schedule 1 [17] gives the Tribunal the power to disqualify a councillor who has engaged in misconduct from civic office for up to 5 years. The Tribunal can currently disqualify councillors against whom pecuniary interest complaints are proved.

Other amendments

Schedule 1 [1] provides that any part of a council meeting in which alleged contraventions of the code of conduct by a councillor is discussed may be closed to the public.

Schedule 1 [3] updates references to a Minister and **Schedule 1 [2]** omits a redundant note as a consequence. **Schedule 1 [5]** updates references to an Act.

Schedule 1 [22] enables savings and transitional arrangements to be made as a consequence of the proposed Act and any other Act that amends the *Local Government Act 1993*.

Schedule 1 [23] inserts savings and transitional provisions.



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Local Government Amendment (Conduct) Bill 2012

No , 2012

A Bill for

An Act to amend the *Local Government Act 1993* to make further provision in relation to the conduct and discipline of councillors and council staff, delegates and administrators; and for related purposes.

The Legislature of New South Wales enacts:

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1 Name of Act

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This Act is the *Local Government Amendment (Conduct) Act 2012*.

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2 Commencement

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This Act commences on a day or days to be appointed by proclamation.

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Schedule 1 Amendment of Local Government Act 1993 No 30

[1] Section 10A Which parts of a meeting can be closed to the public?

Insert after section 10A (2) (h):

- (i) alleged contraventions of any code of conduct requirements applicable under section 440.

[2] Section 56 Application of Division

Omit the note.

[3] Sections 57, 58 (1), 59 (1), 60, 61, 62 (1) and (2), 63 (1), 65 and 66 (1), (3) and (4)

Omit “Minister for Land and Water Conservation” wherever occurring.

Insert instead “Minister for Primary Industries”.

[4] Section 234 When does a vacancy occur in a civic office?

Insert “440I,” after “section” in section 234 (1) (d).

[5] Section 328A General manager to keep register of political donation disclosures

Insert “, *Expenditure*” after “*Funding*” wherever occurring in section 328A (2) and the note.

[6] Sections 328B Reference by general manager to Director-General of political donation matters

Omit section 328B (2) and (3).

[7] Chapter 14 Honesty and disclosure of interests

Omit “and staff of councils” from the Introduction.

Insert instead “, staff of councils and administrators of councils”.

[8] Chapter 14, Introduction

Insert “and enables the Director-General to investigate and take action against councillors who engage in misconduct” after “functions of councils”.

[9] Section 439 Conduct of councillors, staff, delegates and administrators	1
Insert after section 439 (2):	2
(3) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor.	3 4 5
[10] Section 440 Codes of conduct	6
Insert after section 440 (8):	7
(9) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor.	8 9 10
[11] Section 440AA	11
Insert after section 440:	12
440AA Administration of code of conduct	13
(1) The regulations may prescribe a procedure (the <i>model procedure</i>) for administering the model code referred to in section 440.	14 15 16
(2) The model procedure is to set out the procedures for dealing with alleged contraventions of the model code.	17 18
(3) A council must adopt a procedure (the <i>adopted procedure</i>) that incorporates the provisions of the model procedure. The adopted procedure may include provisions that supplement the model procedure.	19 20 21 22
(4) A council's adopted procedure has no effect to the extent that it is inconsistent with the model procedure as in force for the time being.	23 24 25
(5) Councillors, members of staff and delegates of a council must comply with the applicable provisions of:	26 27
(a) the council's adopted procedure, except to the extent of any inconsistency with the model procedure as in force for the time being, and	28 29 30
(b) the model procedure as in force for the time being, to the extent that:	31 32
(i) the council has not adopted the model procedure, or	33
(ii) the adopted procedure is inconsistent with the model procedure, or	34 35
(iii) the model procedure contains provisions or requirements not included in the adopted procedure.	36 37

	(6) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor.	1 2 3
[12]	Chapter 14, Part 1, Division 3	4
	Omit the Division. Insert instead:	5
	Division 3 Misconduct	6
440F	Definitions	7
	(1) In this Division:	8
	<i>misconduct</i> of a councillor means any of the following:	9
	(a) a contravention by the councillor of this Act or the regulations,	10 11
	(b) a failure by the councillor to comply with an applicable requirement of a code of conduct under section 440,	12 13
	(c) a failure by a councillor to comply with an order issued by the Director-General under this Division,	14 15
	(d) an act of disorder committed by the councillor at a meeting of the council or a committee of the council.	16 17
	(2) However, a contravention of the disclosure requirements of Part 2 is not misconduct.	18 19
	Note. A contravention of the disclosure requirements of Part 2 is dealt with under other provisions of this Chapter.	20 21
	(3) A reference in this Division to misconduct includes a reference to misconduct that consists of an omission or failure to do something.	22 23 24
440G	Formal censure of councillor for misconduct	25
	(1) A council may by resolution at a meeting formally censure a councillor for misconduct.	26 27
	(2) A formal censure resolution may not be passed except by a motion to that effect of which notice has been duly given in accordance with regulations made under section 360 and, if applicable, the council's code of meeting practice.	28 29 30 31
	(3) A council may pass a formal censure resolution only if it is satisfied that the councillor has engaged in misconduct on one or more occasions.	32 33 34

(4)	The council must specify in the formal censure resolution the grounds on which it is satisfied that the councillor should be censured.	1 2 3
(5)	A motion for a formal censure resolution may, without limitation, be moved on the report of a committee of the council and any such report must be recorded in the minutes of the meeting of the council.	4 5 6 7
440H	Director-General may investigate misconduct by a councillor	8
(1)	The Director-General may conduct an investigation for the purpose of determining whether a councillor has engaged in misconduct.	9 10 11
(2)	The Director-General may conduct such an investigation:	12
	(a) on his or her own initiative, or	13
	(b) if the general manager of a council refers an allegation of misconduct by a councillor to the Director-General, or	14 15
	(c) if a council, by resolution, refers an allegation of misconduct by a councillor to the Director-General, or	16 17
	(d) if the Ombudsman states in a report that the Ombudsman is satisfied that a councillor has or may have engaged in misconduct, or	18 19 20
	(e) if the Independent Commission Against Corruption states in a report that the Commission is satisfied that a councillor has or may have engaged in misconduct.	21 22 23
(3)	For the purpose 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:	24 25 26
	(a) provide written information, by the date specified in the order, and to verify the information by statutory declaration,	27 28 29
	(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.	30 31 32
	Note. Failure to comply with the direction is an offence under section 661.	33 34
(4)	The Director-General may take copies of or extracts from any document to which the Director-General gains access under this section.	35 36 37

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| (5) | The Director-General may arrange for a departmental report to be prepared in relation to an investigation conducted under this section. | 1
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| (6) | The preparation of a departmental report is a prerequisite to a decision by the Director-General to take disciplinary action against a councillor, unless the disciplinary action is taken on the basis of a report by the Ombudsman or Independent Commission Against Corruption. | 4
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| (7) | This section authorises reports relating to misconduct to be made by the Ombudsman or Independent Commission Against Corruption and a reference to a report of the Ombudsman or Independent Commission Against Corruption is a reference to a report made to the Director-General under the authority of this subsection or under any other provision of this or any other Act. | 9
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| (8) | The powers conferred on the Director-General by this section may also be exercised for the purposes of determining if an administrator has engaged in conduct that would be misconduct if the administrator were a councillor. | 15
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| (9) | In this section:
<i>administrator</i> means an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66).
<i>relevant person</i> means a councillor, a member of staff of a council, a delegate of a council or an administrator. | 19
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| 440I | Director-General may take disciplinary action for misconduct | 25 |
| (1) | The Director-General may take disciplinary action against a councillor if the Director-General is satisfied that: | 26
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| (a) | the councillor has engaged in misconduct (whether on the basis of a departmental report or a report by the Ombudsman or Independent Commission Against Corruption), and | 28
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| (b) | disciplinary action is warranted. | 32 |
| (2) | The Director-General may take one or more of the following actions (and any such action is disciplinary action): | 33
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| (a) | counsel the councillor, | 35 |
| (b) | reprimand the councillor, | 36 |
| (c) | by order, direct the councillor to cease engaging in the misconduct, | 37
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(d)	by order, direct the councillor to apologise for the misconduct in the manner specified in the order,	1 2
(e)	by order, direct the councillor to undertake training,	3
(f)	by order, direct the councillor to participate in mediation,	4
(g)	by order, suspend the councillor from civic office for a period not exceeding 3 months,	5 6
(h)	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).	7 8 9 10 11 12
(3)	In determining which disciplinary action, if any, to take against a councillor who has engaged in misconduct, the Director-General may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.	13 14 15 16 17
(4)	The Director-General is to notify the councillor of any decision to take disciplinary action under this section and the reasons for the decision.	18 19 20
(5)	A copy of the decision and the statement of reasons for the decision are to be provided to the council.	21 22
(6)	The Director-General is to make any decision to suspend a councillor from civic office or to suspend a councillor's right to be paid any fee or other remuneration under this section, and the statement of reasons for the decision, publicly available.	23 24 25 26
(7)	The Director-General may make any other decision to take disciplinary action against a councillor, and the statement of reasons for the decision, publicly available.	27 28 29
(8)	No liability (including liability in defamation) is incurred for making a decision publicly available as permitted or required by this section or for publishing in good faith a fair report or summary of such a decision.	30 31 32 33
440J	Alternatives to disciplinary action by the Director-General	34
(1)	The Director-General may before, during or after an investigation into an allegation of misconduct by a councillor decide to take no further action against the councillor, if satisfied that no further action is warranted.	35 36 37 38

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| (2) | The Director-General may, instead of taking disciplinary action against a councillor: | 1
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| (a) | refer the matter to the council concerned with recommendations as to how the council might resolve the matter, by alternative dispute resolution or otherwise, or | 3
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| (b) | refer the matter to the Pecuniary Interest and Disciplinary Tribunal for consideration. | 6
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| (3) | A matter is referred to the Tribunal under this section by means of a report presented to the Tribunal by the Director-General. A report may contain or be accompanied by such material and observations as the Director-General thinks fit. | 8
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| (4) | The Director-General is to notify the councillor concerned of any decision to refer the matter to the Tribunal. | 12
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| (5) | The regulations may make provision for or with respect to the reference of matters to the Tribunal under this section. | 14
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| 440K | Suspension of a councillor | 16 |
| (1) | A councillor, while suspended from civic office: | 17 |
| (a) | is not entitled to exercise any of the functions of the civic office, and | 18
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| (b) | is not entitled to any fee or other remuneration to which he or she would otherwise be entitled as the holder of the civic office. | 20
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| (2) | The period of suspension under an order made by the Director-General 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. | 23
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| 440L | Appeals against disciplinary action | 28 |
| (1) | A councillor against whom disciplinary action is taken by the Director-General may appeal to the Pecuniary Interest and Disciplinary Tribunal against the decision of the Director-General to take disciplinary action. | 29
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| (2) | An appeal must be made within 28 days after the day on which the councillor is notified of the Director-General's decision to take disciplinary action against the councillor. | 33
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| (3) | The Tribunal may stay any decision made by the Director-General until such time as the Tribunal determines the appeal. | 36
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(4)	On hearing the appeal, the Tribunal may:	1
(a)	confirm the decision, or	2
(b)	amend the decision, or	3
(c)	set aside the decision and substitute a new decision.	4
(5)	If a decision is amended or substituted, the decision as amended or substituted has effect as if it had been made in that form by the Director-General.	5 6 7
(6)	If the Tribunal sets aside a decision to suspend a councillor, any fee or other remuneration withheld under the suspension is payable to the councillor.	8 9 10
(7)	The regulations may make provision for or with respect to the making, hearing and determination of appeals under this section.	11 12
440M	Expenses to be borne by council	13
(1)	The Director-General may recover from a council the reasonable expenses incurred by or in respect of the Department in the conduct of an investigation into a councillor of the council under this Division.	14 15 16 17
(2)	The Director-General may make a determination of the amount of the expenses referred to in subsection (1) and serve a notice on the council requiring the amount so determined be paid in recovery of the Department's expenses.	18 19 20 21
(3)	An amount equal to the expenses as so determined is payable to the Department as a debt by the council concerned, except as determined by the Director-General.	22 23 24
(4)	The council may apply to the Administrative Decisions Tribunal for a review of whether any part of the expenses so determined are not reasonable expenses.	25 26 27
(5)	The Director-General must give effect to any decision of the Tribunal on a review of the determination of the amount of the expenses.	28 29 30
(6)	A reference in this section to expenses incurred includes a reference to remuneration paid to departmental staff.	31 32
440N	Investigation of former councillors	33
(1)	The Director-General may conduct an investigation for the purpose of determining whether a former councillor engaged in misconduct during the period in which the former councillor was a councillor.	34 35 36 37

(2)	For that purpose, sections 440H and 440M apply as if a reference in those sections to a councillor includes a reference to a former councillor.	1 2 3
(3)	The Director-General may before, during or after an investigation into an allegation of misconduct by a former councillor decide to refer the matter to the Pecuniary Interest and Disciplinary Tribunal for consideration.	4 5 6 7
(4)	Section 440J applies to the referral of the matter to the Tribunal in the same way as it applies to a referral of a matter relating to a councillor to the Tribunal.	8 9 10
[13]	Chapter 14, Part 3, Division 3, heading	11
	Omit “misbehaviour”. Insert instead “misconduct”.	12
[14]	Section 470A Pecuniary Interest and Disciplinary Tribunal to decide whether or not to conduct proceedings into a misconduct matter	13 14
	Omit “section 440N” from section 470A (1). Insert instead “section 440J”.	15
[15]	Sections 470B (1), 478 (5), 480 (1) (c), 482A (1) and 484 (1)	16
	Omit “section 440N” wherever occurring. Insert instead “section 440J”.	17
[16]	Section 482 Decision of Pecuniary Interest and Disciplinary Tribunal—pecuniary interest matters	18 19
	Insert after section 482 (4):	20
(5)	In determining which action, if any, to take against a person under this section, the Tribunal may take into account any previous complaints proved against the person, any action previously taken against the person and any other relevant matters.	21 22 23 24 25
(6)	To avoid doubt, a reference in subsection (1) to a councillor includes a reference to a former councillor.	26 27
[17]	Section 482A Decision of Pecuniary Interest and Disciplinary Tribunal—misconduct matters	28 29
	Insert after section 482A (2) (c):	30
(c1)	disqualify the councillor from holding civic office for a period not exceeding 5 years, or	31 32

[18] Section 482A (3) and (4)	1
Insert after section 482A (2):	2
(3) In determining which action, if any, to take against a councillor, the Tribunal may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.	3 4 5 6
(4) In this section, <i>councillor</i> includes a former councillor.	7
[19] Section 485 Appeals to Supreme Court	8
Omit “section 440M” from section 485 (1). Insert instead “section 440L”.	9
[20] Section 661 Failure to comply with certain directions	10
Insert “or section 440H” after “Chapter 13”.	11
[21] Section 674 Remedy or restraint of breaches of this Act—other persons	12
Omit the note to section 674 (5). Insert instead:	13
Note. Section 440L confers a right of appeal to the Pecuniary Interest and Disciplinary Tribunal against disciplinary action taken by the Director-General against a councillor under Division 3 of Part 1 of Chapter 14.	14 15 16 17
[22] Schedule 8 Savings, transitional and other provisions consequent on the enactment of other Acts	18 19
Insert at the end of clause 1 (1):	20
any other Act that amends this Act	21
[23] Schedule 8	22
Insert at the end of the Schedule with appropriate Part and clause numbering:	23
Part Provisions consequent on enactment of Local Government Amendment (Conduct) Act 2012	24 25 26
Definition	27
In this Part, <i>amending Act</i> means the <i>Local Government Amendment (Conduct) Act 2012</i> .	28 29

Application of amendments

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| (1) Division 3 of Part 1 of Chapter 14, as substituted by the amending Act, (the <i>new Division</i>) extends to misconduct that occurred before the commencement of the new Division if at the time that it occurred it was misbehaviour under Division 3 as in force before that substitution. | 6 |
| (2) However, if the Director-General or the Tribunal decides to take disciplinary action or to impose a penalty in respect of misconduct that occurred before the commencement of the new Division, the disciplinary action or penalty must be a type of disciplinary action or penalty that could have been taken or imposed under this Act at the time the misconduct occurred. | 12 |
| (3) An investigation into an allegation of misbehaviour by a councillor that was validly initiated but not finalised before the commencement of the new Division (an <i>ongoing investigation</i>) is taken to have been validly initiated under the new Division. Accordingly, the new Division applies to the ongoing investigation. | 18 |
| (4) The amendments made to Part 3 of Chapter 14 by the amending Act do not apply to proceedings that were referred to the Tribunal or that were commenced in the Tribunal before the commencement of those amendments. Such proceedings are to be dealt with as if the amendments had not been made. | 23 |
| (5) Section 440I (3) as inserted by the amending Act extends to incidents of misconduct by a councillor and disciplinary action taken against the councillor that occurred before the commencement of that subsection. | 27 |
| (6) Sections 482 (5) and 482A (3) as inserted by the amending Act extend to complaints proved against a person, incidents of misconduct by a councillor and any action taken against a councillor or other person before the commencement of those subsections. | 32 |

Authorised investigators

- (1) A member of staff of the Department who is authorised to conduct an investigation under section 440J (2), immediately before its repeal by the amending Act, is taken, on that repeal, to have been delegated the functions of the Director-General with respect to investigations under section 440H.
- (2) Nothing in this clause prevents the Director-General from revoking or amending the delegation.

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