



New South Wales

Local Government Amendment (Discipline) Act 2004 No 73

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Local Government Act 1993 No 30	2
4 Amendment of Independent Commission Against Corruption Act 1988 No 35	2
Schedule 1 Amendments relating to discipline	3
Schedule 2 Other amendments	17
Schedule 3 Consequential amendments	20
Schedule 4 Consequential amendment of Independent Commission Against Corruption Act 1988	23



New South Wales

Local Government Amendment (Discipline) Act 2004 No 73

Act No 73, 2004

An Act to amend the *Local Government Act 1993* in relation to the discipline of councillors, council staff and other persons, and in relation to other matters; to make consequential amendments; and for other purposes. [Assented to 28 September 2004]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Local Government Amendment (Discipline) Act 2004*.

2 Commencement

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

3 Amendment of Local Government Act 1993 No 30

The *Local Government Act 1993* is amended as set out in Schedules 1–3.

4 Amendment of Independent Commission Against Corruption Act 1988 No 35

The *Independent Commission Against Corruption Act 1988* is amended as set out in Schedule 4.

Schedule 1 Amendments relating to discipline

(Section 3)

[1] Section 248A

Omit the section. Insert instead:

248A Annual fees or other remuneration not to be paid during period of suspension

A council must not at any time pay any fee or other remuneration, to which a councillor would otherwise be entitled as the holder of a civic office, in respect of any period during which:

- (a) the councillor is suspended from civic office under this Act, or
- (b) the councillor's right to be paid any fee or other remuneration is suspended under this Act,

unless another provision of this Act specifically authorises payment to be made, or specifically permits a person to authorise payment to be made, when the suspension is terminated.

[2] Section 435 Surcharging by Departmental representative

Omit "culpable" from section 435 (2) (a).

[3] Section 440

Omit the section. Insert instead:

440 Codes of conduct

- (1) The regulations may prescribe a model code of conduct (the **model code**) applicable to councillors, members of staff of councils and delegates of councils.
- (2) Without limiting what may be included in the model code, the model code may:
 - (a) relate to any conduct (whether by way of act or omission) of a councillor, member of staff or delegate in carrying out his or her functions that is likely to bring the council or holders of civic office into disrepute, and

- (b) in particular, contain provisions for or with respect to conduct specified in Schedule 6A.
- (3) A council must adopt a code of conduct (the ***adopted code***) that incorporates the provisions of the model code. The adopted code may include provisions that supplement the model code.
- (4) A council's adopted code has no effect to the extent that it is inconsistent with the model code as in force for the time being.
- (5) Councillors, members of staff and delegates of a council must comply with the applicable provisions of:
 - (a) the council's adopted code, except to the extent of any inconsistency with the model code as in force for the time being, and
 - (b) the model code as in force for the time being, to the extent that:
 - (i) the council has not adopted a code of conduct, or
 - (ii) the adopted code is inconsistent with the model code, or
 - (iii) the model code contains provisions or requirements not included in the adopted code.
- (6) A provision of a council's adopted code is not inconsistent with the model code merely because the provision makes a requirement of the model code more onerous for persons required to observe the requirement.
- (7) A council must, within 12 months after each ordinary election, review its adopted code and make such adjustments as it considers appropriate and as are consistent with this section.
- (8) Nothing in this section or such a code gives rise to, or can be taken into account in, any civil cause of action, but nothing in this section affects rights or liabilities arising apart from this section.

[4] Chapter 14, Part 1, Division 3

Insert after section 440E:

Division 3 Misbehaviour

440F Definitions

- (1) In this Division:

misbehaviour 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 as required under section 440 (5),
- (c) an act of disorder committed by the councillor at a meeting of the council or a committee of the council,

but does not include a contravention of the disclosure requirements of Part 2.

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

- (2) A reference in this Division to ***misbehaviour*** or an ***incident of misbehaviour*** includes a reference to misbehaviour that consists of an omission or failure to do something.

440G Formal censure of councillor for misbehaviour

- (1) A council may by resolution at a meeting formally censure a councillor for misbehaviour.
- (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.
- (3) A council may pass a formal censure resolution only if it is satisfied that the councillor has misbehaved on one or more occasions.
- (4) The council must specify in the formal censure resolution the grounds on which it is satisfied that the councillor should be censured.

- (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.

440H How is the process for suspension of a councillor for misbehaviour initiated?

- (1) The process for the suspension of a councillor from civic office is initiated by:
- (a) a request made by the council by resolution communicated to the Director-General, in which the council states its belief that grounds may exist that warrant the councillor's suspension, or
 - (b) a request made by the Director-General to the council for a report from the council in relation to the councillor's alleged misbehaviour, or
 - (c) a report made by the Independent Commission Against Corruption or the Ombudsman, in which the Commission or the Ombudsman states that the Commission or Ombudsman is satisfied that grounds exist that warrant the councillor's suspension.
- (2) The council must make a report to the Director-General requested under subsection (1) (b) before the date specified in the Director-General's request or any later date allowed by the Director-General.
- (3) This section authorises such requests and reports to be made, and a reference in this section to a report made by the Independent Commission Against Corruption or the Ombudsman is a reference to a report made to the Director-General under the authority of this subsection or under any other provisions of this or any other Act.
- (4) Nothing in this section affects any function under any other provisions of this or any other Act that authorises the making of a report or recommendation concerning suspension of a councillor from civic office.

440I What are the grounds on which a councillor may be suspended?

- (1) The grounds on which a councillor may be suspended from civic office under this Division are that:
 - (a) the councillor's behaviour has:
 - (i) been disruptive over a period, and
 - (ii) involved more than one incident of misbehaviour during that period,and the pattern of behaviour during that period is of such a sufficiently serious nature as to warrant the councillor's suspension, or
 - (b) the councillor's behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.
- (2) The process for the suspension of a councillor from civic office cannot be initiated by a request made by the council unless:
 - (a) where subsection (1) (a) applies—the councillor has:
 - (i) on two or more occasions been formally censured for incidents of misbehaviour that occurred during the period concerned, or
 - (ii) on at least one occasion been expelled from a meeting of the council or a committee of the council for an incident of misbehaviour during the period concerned, or
 - (b) where subsection (1) (b) applies—the councillor has:
 - (i) been formally censured for the incident of misbehaviour concerned, or
 - (ii) been expelled from a meeting of the council or a committee of the council for the incident of misbehaviour concerned.
- (3) Subsection (2) does not affect the Director-General's power to initiate the process for the suspension of a councillor from civic office.
- (4) Furthermore, subsection (2) does not prevent the Director-General from initiating the process for the suspension of a councillor from civic office as a result of a request or report referred to in section 440H.

440J How are requests and reports dealt with?

- (1) The Director-General may arrange for a departmental report to be prepared into the matters raised by or connected with a request or report referred to in section 440H.
- (2) The Director-General may authorise a member of the staff of the Department to conduct an investigation into any or all of those matters to assist in the preparation of the departmental report.
- (3) The preparation of a departmental report is a prerequisite to a decision by the Director-General to suspend the councillor from office, but is not necessary if the Independent Commission Against Corruption or the Ombudsman states in a report that the Commission or Ombudsman is satisfied that grounds exist that warrant the councillor's suspension.
- (4) In this Division, **departmental report** means a report prepared by a person authorised by the Director-General to do so.

440K Suspension by Director-General for misbehaviour

- (1) The Director-General may by order in writing suspend a councillor from civic office for a period not exceeding one month:
 - (a) if the Director-General has considered a departmental report into the matters concerned and is satisfied that grounds exist that warrant the councillor's suspension, or
 - (b) if the Independent Commission Against Corruption or the Ombudsman states in a report that the Commission or Ombudsman is satisfied that grounds exist that warrant the councillor's suspension.
- (2) A copy of the order must be served on the councillor.
- (3) A councillor, while suspended from civic office under this section:
 - (a) is not entitled to exercise any of the functions of the civic office, and
 - (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.

440L When does an order of suspension take effect?

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.

440M Appeals against suspension

- (1) A councillor against whom an order of suspension is made by the Director-General may appeal against the order to the Pecuniary Interest and Disciplinary Tribunal.
- (2) Such an appeal may not be made more than 28 days after the date the order was served on the councillor.
- (3) The Tribunal may stay the order of suspension until such time as the Tribunal determines the appeal.
- (4) The Tribunal may:
 - (a) confirm the order, or
 - (b) quash the order, or
 - (c) amend the order consistently with the powers of the Director-General.
- (5) If the order is quashed, any fee or other remuneration withheld is payable to the councillor.
- (6) If the order is amended, the order as amended has effect as if it had been made in that form by the Director-General.
- (7) The regulations may make provision for or with respect to the making, hearing and determination of appeals under this section.

440N Referral of matters to Pecuniary Interest and Disciplinary Tribunal

- (1) The Director-General may refer a matter that is the subject of a request or report referred to in section 440H for consideration by the Pecuniary Interest and Disciplinary Tribunal instead of suspending the councillor concerned under this Division.

- (2) However, a matter that is the subject of a request by a council may not be referred to the Tribunal unless the councillor concerned has previously been suspended under this Chapter for misbehaviour.
- (3) The preparation and consideration of a departmental report is not a prerequisite to a decision by the Director-General to refer a matter to the Tribunal, but the Director-General may take into consideration a departmental report into the matter if one is prepared.
- (4) 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.
- (5) The regulations may make provision for or with respect to the reference of matters to the Tribunal under this section.

440O Are there alternatives to suspension or referral to Pecuniary Interest and Disciplinary Tribunal?

- (1) The Director-General may, after considering a request or report made under section 440H and any relevant departmental report prepared under section 440J, decide to take no further action on the request or report, whether or not a departmental investigation or departmental report has been authorised, started or completed, if satisfied that no further action is warranted.
- (2) The Director-General may, instead of suspending a councillor from civic office under this Division or referring the matter to the Pecuniary Interest and Disciplinary Tribunal, refer the matter to the council with recommendations as to how the council might resolve the matter, by alternative dispute resolution or otherwise.

440P Expenses to be borne by council

- (1) The Director-General may recover the reasonable expenses incurred by or in respect of the Department in considering and dealing with a request made by a council under section 440H from the council, including the expenses of any departmental investigation and departmental report into the matters raised by or connected with the request.

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- (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.
 - (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.
 - (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.
 - (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.
 - (6) A reference in this section to expenses incurred includes a reference to remuneration paid to departmental staff.

440Q Reasons to be given

- (1) The Director-General is required to prepare a written statement of reasons for:
 - (a) imposing or deciding not to impose a period of suspension, or
 - (b) referring a matter to the Pecuniary Interest and Disciplinary Tribunal.
- (2) The statement of reasons is to be provided to the council and councillor concerned.

[5] Chapter 14, Part 3, Division 2, heading

Omit "**Tribunal**".

Insert instead "**and Disciplinary Tribunal—pecuniary interest matters**".

[6] Chapter 14, Part 3, Division 3

Insert after section 470:

Division 3 Proceedings before the Pecuniary Interest and Disciplinary Tribunal—misbehaviour matters

470A Pecuniary Interest and Disciplinary Tribunal to decide whether or not to conduct proceedings into a referred matter relating to misbehaviour

- (1) After considering a report presented to it under section 440N in relation to a referred matter, the Pecuniary Interest and Disciplinary Tribunal may decide to conduct proceedings into the matter.
- (2) If the Pecuniary Interest and Disciplinary Tribunal decides not to conduct proceedings into a referred matter, it must provide a written statement of its decision, and the reasons for its decision:
 - (a) to the councillor to whom the report relates, and
 - (b) to the council concerned, and
 - (c) to the Director-General.
- (3) To avoid doubt, a decision by the Pecuniary Interest and Disciplinary Tribunal not to conduct proceedings into a referred matter is not a decision to which section 484 or 485 applies.

470B Circumstances in which Pecuniary Interest and Disciplinary Tribunal may dispense with hearing

- (1) After considering a report presented to it under section 440N and any other document or other material lodged with or provided to the Tribunal in relation to the report, the Pecuniary Interest and Disciplinary Tribunal may determine the proceedings without a hearing if:
 - (a) the Director-General and the councillor to whom the report relates have agreed that the proceedings may be determined without a hearing, and
 - (b) there are no material facts in dispute between the Director-General and the councillor, and

(c) in the opinion of the Tribunal, public interest considerations do not require a hearing.

(2) To avoid doubt, a decision by the Pecuniary Interest and Disciplinary Tribunal to determine proceedings in a referred matter without a hearing is a decision to which sections 484 and 485 apply.

[7] Chapter 14, Part 3, Division 4, heading

Insert before section 471:

Division 4 Proceedings before the Pecuniary Interest and Disciplinary Tribunal—general provisions

[8] Section 478 Additional complaints

Insert after section 478 (4):

(5) This section does not apply to proceedings in relation to a matter referred to the Pecuniary Interest and Disciplinary Tribunal under section 440N.

[9] Section 480 Release of information

Insert “in the case of proceedings in relation to a complaint—” before “direct” in section 480 (1) (a) and (b) wherever occurring.

[10] Section 480 (1)

Insert at the end of section 480 (1) (b):

, or

(c) in the case of proceedings in relation to a matter referred to the Tribunal under section 440N—direct that all or any of the following matters are not to be published:

- the name and address of any witness
- the name and address of the councillor to whom the referred matter relates
- any specified evidence
- the subject-matter of the referred matter.

[11] Section 480 (3) (b)

Insert “or the councillor to whom the referred matter relates,” after “made,”.

[12] Section 482 Decision of Pecuniary Interest and Disciplinary Tribunal—pecuniary interest matters

Insert at the end of section 482 (1) (d):

, or

- (e) 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 6 months (without suspending the councillor from civic office for that period).

[13] Section 482A

Insert after section 482:

482A Decision of Pecuniary Interest and Disciplinary Tribunal—misbehaviour matters

- (1) This section applies where a matter has been referred to the Pecuniary Interest and Disciplinary Tribunal under section 440N.
- (2) The Tribunal may, if it finds that the behaviour concerned warrants action under this section:
 - (a) counsel the councillor, or
 - (b) reprimand the councillor, or
 - (c) suspend the councillor from civic office for a period not exceeding 6 months, or
 - (d) 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 6 months (without suspending the councillor from civic office for that period).

[14] Section 484 Pecuniary Interest and Disciplinary Tribunal to provide details of its decisions

Insert “(or to the relevant council in the case of a matter that has been referred to the Tribunal under section 440N)” after “complaint” in section 484 (1).

[15] Section 485 Appeals to Supreme Court

Insert “, other than a decision of the Tribunal determining an appeal to the Tribunal under section 440M” after “the proceeding” in section 485 (1).

[16] Chapter 14, Part 5

Insert after section 490:

Part 5 Miscellaneous

490A Acts of disorder

For the purposes of this Chapter and Schedule 6A, a councillor commits an ***act of disorder*** if the councillor, at a meeting of the council or a committee of the council, does anything that is prescribed by the regulations as an act of disorder for the purposes of this Chapter and Schedule 6A.

490B Certain regulations not affected

Nothing in this Chapter affects any regulations made, or the power to make regulations, with respect to the conduct of meetings of a council or a committee of a council, and in particular with respect to:

- (a) the keeping of order at any such meetings, or
- (b) censuring a councillor in connection with a breach of a council’s code of meeting practice.

[17] Section 674 Remedy or restraint of breaches of this Act—other persons

Insert after the note at the end of section 674 (4):

- (5) Subsection (1) does not apply in relation to anything done or omitted to be done under Division 3 of Part 1 of Chapter 14.

Note. Section 440M confers a right of appeal to the Pecuniary Interest and Disciplinary Tribunal against an order of suspension of a councillor under Division 3 of Part 1 of Chapter 14.

[18] Schedule 6A

Insert after Schedule 6:

Schedule 6A Code of conduct

(Section 440)

- 1** Conduct that contravenes all or specified provisions of this Act or the regulations in all or specified circumstances
- 2** Conduct that is detrimental to the pursuit of the charter of a council
- 3** Improper or unethical conduct
- 4** Abuse of power and other misconduct
- 5** Action causing, comprising or involving any of the following:
 - (a) intimidation, harassment or verbal abuse
 - (b) discrimination, disadvantage or adverse treatment in relation to employment
 - (c) prejudice in the provision of a service to the community
- 6** Conduct of a councillor causing, comprising or involving any of the following:
 - (a) directing or influencing, or attempting to direct or influence, a member of the staff of the council or a delegate of the council in the exercise of the functions of the member or delegate
 - (b) an act of disorder committed by the councillor at a meeting of the council or a committee of the council

Schedule 2 Other amendments

(Section 3)

[1] Section 352

Omit the section. Insert instead:

352 Independence of staff for certain purposes

- (1) A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.
- (2) This section does not prevent the council or the mayor from directing the general manager of the council to provide advice or a recommendation.

[2] Section 734A

Insert after section 734:

734A Preliminary enquiries by Director-General

- (1) The Director-General may make preliminary enquiries for the purpose of deciding whether to exercise any of his or her powers of investigation under this Act or powers to authorise an investigation under this Act.
- (2) The enquiries may be made whether or not a complaint has been made under this Act in connection with any matter to which the enquiries relate.

[3] Schedule 4 Local Government Pecuniary Interest and Disciplinary Tribunal

Insert after clause 2 (2):

- (2A) If so requested by the member, the member's deputy may, if available, act in the place of the member in connection with a particular matter when the member is not absent. For this purpose, the affairs of the Pecuniary Interest and Disciplinary Tribunal may be conducted concurrently in two divisions.

[4] Schedule 4, clause 2 (3)

Omit "so acting". Insert instead "acting under this clause".

[5] Schedule 8 Savings, transitional and other provisions consequent on the enactment of other Acts

Insert at the end of clause 1 (1):

Local Government Amendment (Discipline) Act 2004

[6] Schedule 8

Insert at the end of the Schedule with appropriate Part and clause numbers:

**Part Provisions consequent on enactment of
Local Government Amendment
(Discipline) Act 2004**

Meaning of “amending Act”

In this Part, ***amending Act*** means the *Local Government Amendment (Discipline) Act 2004*.

Surcharging

The amendment made to section 435 (2) by the amending Act applies only to alleged negligence or misconduct occurring or committed after the commencement of the amendment.

Local Government Pecuniary Interest and Disciplinary Tribunal

On and from the commencement of the amendment made to section 487 by the amending Act:

- (a) the Local Government Pecuniary Interest Tribunal established under section 487 immediately before that commencement continues in existence and is to be known as the Local Government Pecuniary Interest and Disciplinary Tribunal, and
- (b) the person holding office as the Local Government Pecuniary Interest Tribunal immediately before that commencement continues in office, subject to Schedule 4, as the Local Government Pecuniary Interest and Disciplinary Tribunal for the balance of the term of office for which he or she was appointed, and

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- (c) a person holding office as the deputy of the member immediately before that commencement continues in office, subject to Schedule 4, on the same terms and conditions as those applicable immediately before that commencement, and
 - (d) any matters or proceedings pending before the Local Government Pecuniary Interest Tribunal immediately before that commencement are not affected by the enactment or commencement of the amending Act and are to continue to be dealt with by the Local Government Pecuniary Interest and Disciplinary Tribunal, and
 - (e) a reference in any other Act, in any instrument made under an Act or in any other document to the Local Government Pecuniary Interest Tribunal is to be read as a reference to the Local Government Pecuniary Interest and Disciplinary Tribunal.

Misbehaviour

Division 3 of Part 1 of Chapter 14, as inserted by the amending Act, applies to misbehaviour occurring after but not before the earlier of the commencement of that Division or the commencement of the first provisions of that Division to commence.

Schedule 3 Consequential amendments

(Section 3)

[1] Section 12 What information is publicly available?

Omit “the council’s code of conduct” from section 12 (1).

Insert instead “the model code prescribed under section 440 (1) and the code of conduct adopted by the council under section 440 (3)”.

[2] Section 329 Can the holder of a civic office be dismissed?

Insert “and Disciplinary” after “Pecuniary Interest” in section 329 (5).

[3] Section 372 Rescinding or altering resolutions

Insert “regulations made under section 360 and, if applicable,” after “in accordance with” in section 372 (1).

[4] Section 372 (6)

Insert “of the meeting of the council” after “minutes”.

[5] Chapter 14, Introduction

Omit “requires councils to adopt a code of conduct”.

Insert instead “provides for the adoption of codes of conduct”.

[6] Chapter 14, Introduction

Insert “and Disciplinary” after “Pecuniary Interest”.

[7] Sections 465 and 468

Insert “and Disciplinary” after “Pecuniary Interest” wherever occurring.

[8] Sections 469 Pecuniary Interest and Disciplinary Tribunal to decide whether or not to conduct proceedings into a complaint

Insert “and Disciplinary” after “Pecuniary Interest” wherever occurring.

[9] Section 470 Circumstances in which Pecuniary Interest and Disciplinary Tribunal may dispense with hearing

Insert “and Disciplinary” after “Pecuniary Interest” wherever occurring in the section and the note to the section.

[10] Sections 471–486

Insert “and Disciplinary” after “Pecuniary Interest” wherever occurring.

[11] Chapter 14, Part 3, Division 2, flowchart (after section 486)

Omit “**Tribunal**” from the heading.

Insert instead “**and Disciplinary Tribunal—pecuniary interest matters**”.

[12] Chapter 14, Part 3, Division 2, flowchart

Insert “and Disciplinary” after “Pecuniary Interest” where secondly occurring.

[13] Chapter 14, Part 3, Division 2, flowchart

Insert below the matter relating to “• disqualify for up to 5 years”:

- suspend right to be paid for up to 6 months

[14] Chapter 14, Part 4, heading

Insert “and Disciplinary” after “**Pecuniary Interest**”.

[15] Sections 487–490

Insert “and Disciplinary” after “Pecuniary Interest” wherever occurring.

[16] Section 673 Remedy or restraint of breaches of this Act—the Minister, the Director-General and councils

Insert “and Disciplinary” after “Pecuniary Interest” in the note to the section.

[17] Section 674 Remedy or restraint of breaches of this Act—other persons

Insert “and Disciplinary” after “Pecuniary Interest” in the note to the section.

[18] Schedule 4 Local Government Pecuniary Interest and Disciplinary Tribunal

Insert “and Disciplinary” after “Pecuniary Interest” in clause 1.

[19] Dictionary

Omit the definition of *Pecuniary Interest Tribunal*. Insert instead:

Pecuniary Interest and Disciplinary Tribunal means the
Local Government Pecuniary Interest and Disciplinary
Tribunal established under this Act.

Schedule 4 Consequential amendment of Independent Commission Against Corruption Act 1988

(Section 4)

Section 9 Limitation on nature of corrupt conduct

Insert after section 9 (5):

- (6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

[Second reading speech made in—

Legislative Assembly on 3 June 2004

Legislative Council on 22 September 2004]

BY AUTHORITY