

Circular Details	Circular No 19-25 / 2 October 2019 / A671874
Previous Circular	18-44 Commencement of the new Model Code of Conduct for Local Councils in NSW and Procedures
Who should read this	Mayors / Councillors / General Managers / Joint Organisation Executive Officers / Complaints Coordinators / Conduct Reviewers
Contact	Council Governance Team – (02) 4428 4100 / olg@olg.nsw.gov.au
Action required	Council to Implement

Penalties available to councils for code of conduct breaches by councillors

What's new or changing?

- The purpose of this Circular is to inform councils and joint organisations of the recent decision by the Supreme Court in the matter of *Cornish v Secretary, Department of Planning, Industry and Environment* [2019] NSWSC 1134. The Court's decision may be found [here](#).
- The Supreme Court has held that, notwithstanding the penalties available to councils for code of conduct breaches by councillors under the *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* (the Procedures), the only disciplinary power available to councils under the *Local Government Act 1993* for code of conduct breaches by councillors, is the power to formally censure conferred under section 440G.

What this will mean for your council

- The Office of Local Government (OLG) is currently considering the implications of the decision and will provide further guidance to councils once it has done so.
- In the meantime, OLG strongly discourages councils from imposing penalties on councillors for breaches of their codes of conduct other than those available under paragraphs (h) and (i) of clause 7.59 of the Procedures, namely:
 - that a councillor be formally censured for a breach under section 440G of the Act (clause 7.59(h)); and
 - that a councillor be formally censured for a breach under section 440G and the matter referred to OLG for further action under the misconduct provisions of the Act (clause 7.59(i)).
- The Supreme Court has held that it remains open to councils to make findings of inappropriate conduct by councillors public by publishing the investigator's findings and determination in the minutes of the meeting (see clause 7.59(f) of the Procedures).
- Councils should be mindful that under the new Procedures, an investigator must first consult with OLG prior to finalising their report where they propose to recommend that the councillor be formally censured for a breach and the matter referred to OLG for further action under the misconduct provisions of the Act.
- OLG would encourage councils' complaints coordinators to make conduct reviewers aware of the Supreme Court's decision and to discourage them from

recommending penalties for breaches by councillors other than those referred to above.

Key points

- The Supreme Court's decision means that decisions by councils to impose the following penalties on councillors under the new Procedures may be open to challenge:
 - that a councillor undertakes training or other education relevant to conduct giving rise to a breach (clause 7.59(a));
 - that a councillor is counselled for their conduct (clause 7.59(b));
 - that a councillor is removed from membership of a committee of the council or any other body or organisation that the councillor serves on as the council's representative (clause 7.59(c));
 - that a councillor give an undertaking not to repeat offending behaviour in such time and form specified by a resolution (clause 7.59(d));
 - that a councillor apologise to any person or organisation affected by a breach in such a time and form specified by a resolution (clause 7.59(e)).
- The Supreme Court's decision makes it clear that it remains open to general managers and conduct reviewers/investigators to informally resolve code of conduct complaints against councillors by alternative means such as, but not limited to, explanation, counselling, training, mediation, informal discussion, negotiation, a voluntary apology or an undertaking not to repeat offending behaviour.
- The decision has no implications for councils' ability to take disciplinary action under the Procedures for code of conduct breaches by council officials other than councillors.

Where to go for further information

- For more information, contact the Council Governance Team by telephone on 02 4428 4100 or by email at olg@olg.nsw.gov.au.



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