

2009

Guide to Councillor Conduct Arrangements

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Minister's Foreword

Most Councillors are responsible representatives of their communities who work together for the public good. Councillors who act properly and who give their personal time and energy to improve their community do not deserve to have their role diminished by the misconduct of a few.

In 2008, the Victorian Government established new arrangements for the deliberate purpose of dealing with Councillors who fail to conduct themselves properly and who bring local government into disrepute.

The new arrangements include a set of standards for Councillors, the "Councillor conduct principles", which reflect broad public expectations of Councillors. These Principles must be in every Council's Code of Conduct and apply to all Victorian Councillors.

Under the new rules, a Council can enforce its Councillor Code of Conduct by having an independent Councillor Conduct Panel established to decide whether a Councillor has breached the Council's Code. A Panel can discipline a Councillor or direct him or her to undertake training, counselling or mediation.

If a Councillor's misconduct is more serious, a Councillor Conduct Panel can authorise that the matter be heard by the Victorian Civil and Administrative Tribunal, which has the power to suspend a Councillor or disqualify him or her from holding office.

This Guide describes the new arrangements and provides useful advice for Councillors and Council administrations.



A handwritten signature in blue ink that reads "Richard Wynne". The signature is written in a cursive, flowing style.

RICHARD WYNNE
Minister for Local Government

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Summary

The Local Government Act 1989 sets out standards of conduct for Councillors and provides specific arrangements to deal with misconduct.

Standards of Conduct include the Councillor conduct principles that must be included in every Council's "Councillor Code of Conduct" and which apply to all elected Councillors in Victoria. These Principles describe the standards that the community has a right to expect of Councillors. They operate in addition to provisions of the Act that specifically prohibit certain behaviours and actions.

Arrangements to deal with misconduct operate at several levels. Within Councils themselves, many misconduct matters can be dealt with through the dispute resolution procedures adopted in Councillor Codes of Conduct.

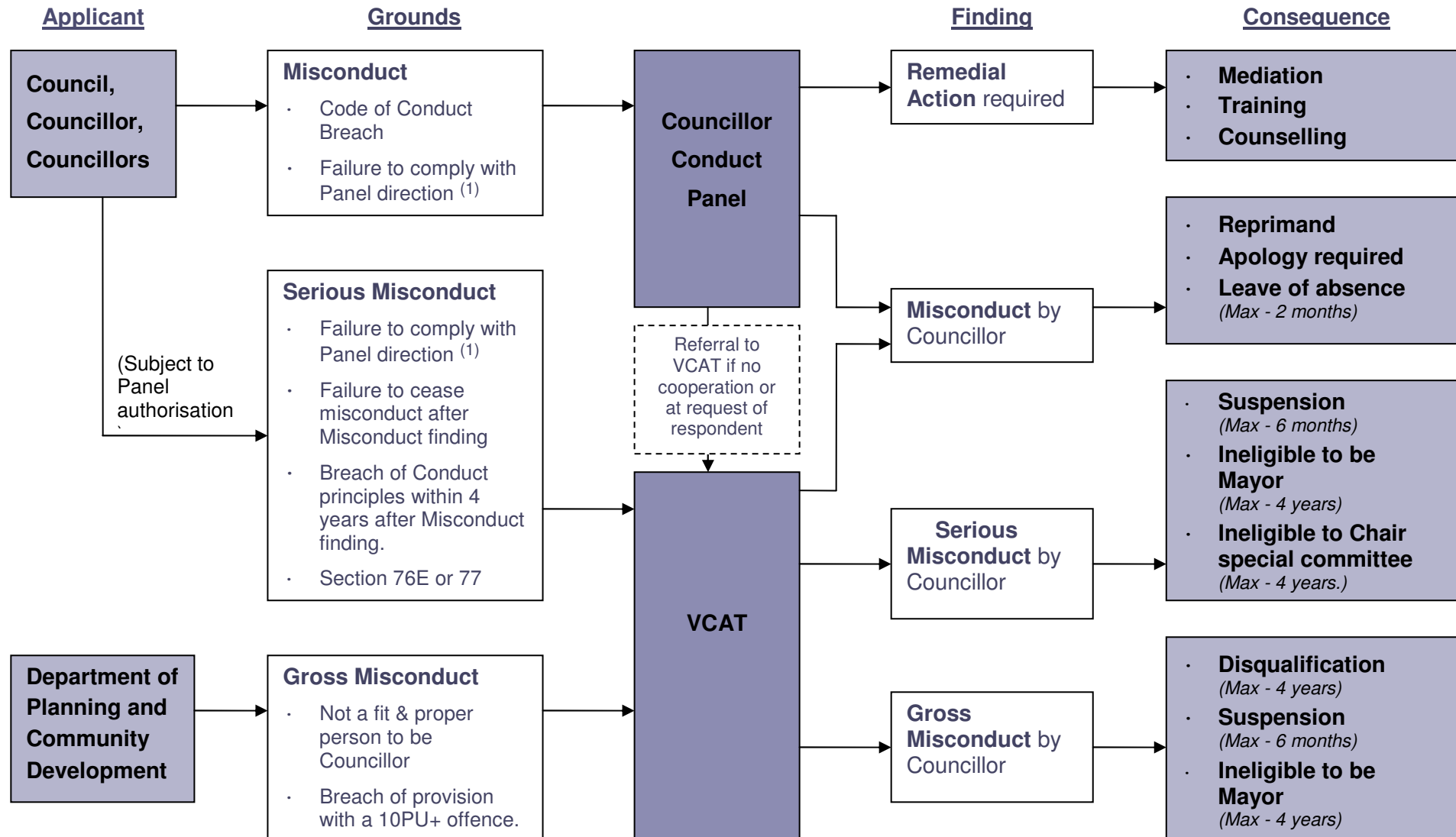
Where a matter cannot be resolved internally, a Council, Councillor or group of Councillors can apply for a Councillor Conduct Panel to be established. A Panel has powers to discipline a Councillor for "misconduct" if it considers that there has been a breach of the Councillor Code of Conduct. It may also require a Councillor to undertake training, counselling or mediation.

If misconduct is more serious, a Councillor Conduct Panel can authorise an application to the Victorian Civil and Administrative Tribunal. If the Tribunal subsequently makes a finding of "serious misconduct" it may impose more serious discipline on a Councillor, including suspending the Councillor for up to six months.

If a Councillor has acted in a way that demonstrates that he or she is not a fit and proper person to hold office as a Councillor, or has committed a serious breach of the Act, the Department of Planning and Community Development may apply to VCAT for a finding of "gross misconduct". This can result in serious disciplinary action such as suspension or disqualification. If a Councillor has committed an offence under the Act, the Department may have the Councillor charged in Court, which can result in a substantial fine or a term of imprisonment.

Overall, the Councillor conduct arrangements provide a coherent framework to guide the conduct of individual Councillors and to deal with cases of misconduct. This is illustrated on the next page and detailed in the following Chapters of the Guide.

Councillor Conduct Framework



(1) A failure to comply with a Councillor Conduct Panel direction constitutes serious misconduct only when the Panel made a finding of misconduct against the Councillor.
 (2) If VCAT considers that remedial action is required it will refer the matter to a Councillor Conduct Panel.
 (3) A finding of serious or gross misconduct automatically disqualifies the Councillor from holding the office of Mayor for the remainder of the Council term of office unless VCAT otherwise orders

Reading Guide

Purpose of this guide

This guide explains the Councillor Conduct arrangements that apply to all Councils and all Councillors in Victoria. It is designed to give Councils, Councillors and Council administrations guidance about how to administer the arrangements for their Council. It also explains the nature and effect of the arrangements for the wider information of the Victorian community.

The statutory basis for the Councillor conduct arrangements is in the *Local Government Act 1989* (the Act), particularly in Divisions 1A and 1B of Part 4 and in Schedule 5.

Overview of the guide

Chapter 1: Standards and Consequences

Chapter 1 describes the standards of conduct that the Act requires of Councillors. This includes the Councillor conduct principles and other types of conduct that are expressly prohibited under the Act. It also defines the levels of misconduct for which findings may be made by a Councillor Conduct Panel or by VCAT and lists the possible consequences of each type of finding.

Chapter 2: Internal Council Processes

Chapter 2 describes the requirements for Councillor Codes of Conduct and provides information about internal dispute resolution processes.

Chapter 3: Councillor Conduct Panels

Chapter 3 describes the operation of Councillor Conduct Panels in detail. It describes the role of a Panel and how applications are made. The Chapter also describes the various actions and decisions that may be made by a Panel as well as describing Panel hearing procedures.

Chapter 4: Panel Administration

Chapter 4 deals with Panel administration matters, such as the eligibility to be a Panel member, the role of the MAV in the establishment of Panels and the role of the Council administration in Panel matters.

Chapter 5: VCAT – Misconduct Proceedings

Chapter 5 describes the role of VCAT in considering applications for findings of misconduct, serious misconduct and gross misconduct. It also describes Tribunal procedures and possible findings.

Chapter 6: VCAT – Other Roles

Chapter 6 describes some other roles of VCAT. These roles relate to applications for review of a Panel decision, an application for a Councillor charged with a relevant offence to be required to take leave or an application to seek relief from disqualification.

Terminology

The Guide uses the following terminology.

“**CCP**” means a Councillor Conduct Panel.

“**CCP Registrar**” means the officer appointed by the CEO to be the Councillor Conduct Panel Registrar.

“**CEO**” means the Chief Executive officer of the Council.

“**Councillor conduct principles**” include the primary principle of Councillor conduct and the general Councillor conduct principles under sections 76B and 76BA of the Act.

“**MAV**” means the Municipal Association of Victoria.

“**Panel**” means a Councillor Conduct Panel.

“**Part**” means a Part of this Guide.

“**Section**” means a section of the Act.

“**The Act**” means the *Local Government Act 1989*.

“**The Regulations**” means the *Local Government (General) Regulations 2004*.

“**The VCAT Act**” means the *Victorian Civil and Administrative Tribunal Act 1998*.

“**Tribunal**” means the VCAT Tribunal.

“**VCAT**” means the Victorian Civil and Administrative Tribunal.

1. Standards and Consequences

The Councillor Conduct arrangements provided in the Act are based on common sets of principles and consequences that apply to all Councils and all Councillors. This includes:

- Councillor conduct principles,
- Specified levels of misconduct,
- Prescribed conduct in the Act, and
- The consequences of specific findings.

1.1 Councillor conduct principles

The Act defines “Councillor conduct principles”, which are standards of conduct that the community has a right to expect of all Councillors. These include a “Primary Principle” and seven “General Principles”. These principles must be included in every Councillor Code of Conduct (See Part 2.1) and must be observed by every Councillor.

1.1.1 Primary principle

Section 76B of the Act sets out the Primary Principle of Councillor Conduct being that, in performing the role of a Councillor, a Councillor must:

- Act with integrity, and
- Impartially exercise his or her responsibilities in the interests of the local community, and
- Not improperly seek to confer an advantage or disadvantage on any person.

1.1.2 General principles

Section 76BA of the Act goes on to require that, in performing the role of a Councillor, a Councillor must also:

- (a) Avoid conflicts between his or her public duties as a Councillor and his or her personal interests and obligations,
- (b) Act honestly and avoid statements (whether oral or in writing) or actions that will or are likely to mislead or deceive a person,
- (c) Treat all persons with respect and have due regard to the opinions, beliefs, rights and responsibilities of other Councillors, Council officers and other persons,
- (d) Exercise reasonable care and diligence and submit himself or herself to the lawful scrutiny that is appropriate to his or her office,
- (e) Endeavour to ensure that public resources are used prudently and solely in the public interest,

- (f) Act lawfully and in accordance with the trust placed in him or her as an elected representative, and
- (g) Support and promote these principles by leadership and example and act in a way that secures and preserves public confidence in the office of Councillor.

1.2 Levels of misconduct

In section 81A, the Act describes three levels of misconduct. These are the types of findings that may be made by VCAT or, to a limited extent, by a Councillor Conduct Panel. Each level reflects the seriousness of the conduct and carries appropriate consequences to ensure the cessation of the conduct and its adverse effects on Council administration. Where appropriate, the adoption of remedial action to prevent or reduce the likelihood of its repetition may also be prescribed by a Panel.

The three levels of misconduct defined by section 81A are:

- Misconduct,
- Serious misconduct, and
- Gross misconduct.

Each of these levels of misconduct carries appropriate consequences (See Part 1.4). However, these consequences can only be imposed following a hearing by either an independent Councillor Conduct Panel or by the VCAT Tribunal.

1.2.1 Misconduct

This is the lowest level of misconduct that may be a finding of a Panel or Tribunal. It is primarily concerned with breaches of a Council's Councillor Code of Conduct and is prescribed for the purpose of supporting Councils in the administration of their Codes.

The definition of "misconduct" in the Act is:

- Conduct by a Councillor that is in breach of the Councillor Code of Conduct, or
- The failure of a Councillor to comply with a direction of a Councillor Conduct Panel where the Panel has not made a finding of misconduct against the Councillor.

1.2.2 Serious misconduct

Serious misconduct by a Councillor is mainly about conduct that is disruptive to good governance at a local level. It goes beyond conduct that merely breaches the Councillor Code of Conduct to include repeated misconduct and conduct that breaches some laws relating to the proper functioning of a Council.

Serious misconduct also includes where a Councillor has failed to comply with a direction of a Councillor Conduct Panel after the Panel has made a finding of misconduct.

The Act defines “serious misconduct” to be:

- The failure of a Councillor to comply with a direction of a Councillor Conduct Panel following a finding of misconduct by the Panel in respect of the Councillor,
- The failure of a Councillor to cease conduct that contravenes the Councillor Code of Conduct after a Panel or Tribunal has made a finding of misconduct or serious misconduct against the Councillor in respect of that behaviour,
- Conduct by a Councillor that contravenes the Councillor conduct principles after the Councillor has had a previous finding of misconduct, serious misconduct or gross misconduct made against him or her by a Panel or Tribunal in the preceding 4 years, or
- Conduct by a Councillor that contravenes the Councillor conduct principles and either section 76E or 77 of the Act (See Parts 1.3.2 & 1.3.3).

1.2.3 Gross misconduct

This is the most serious level of misconduct. It is misconduct of a type that directly reflects on the character of the Councillor and their suitability to hold the office of Councillor. This is in contrast to findings of misconduct and serious misconduct which generally relate to the operation of a particular Council.

Gross misconduct is defined in the Act to be behaviour by a Councillor that:

- Contravenes the Councillor conduct principles and a section of the Act which has a prescribed penalty of at least 10 penalty units, or
- Demonstrates that the Councillor is not of good character or is otherwise not a fit and proper person to hold the office of Councillor.

1.3 Conduct in the Act

The Act also specifies some types of conduct that are expressly prohibited. They relate to specific actions and are unlike the Principles, which describe how Councillors should conduct themselves in more general terms.

These matters can be particularly relevant to considerations of serious or gross misconduct by the Tribunal. In many cases a breach of a specific provision in the Act may be subject to prosecution in a Court.

(Note: Although some of these provisions also apply to other people, such as Council staff and members of Council committees, the discussion in this Guide is limited to Councillors.)

1.3.1 Misuse of position

Section 76D of the Act prohibits the misuse of position. It involves two criteria, both of which must be met for an offence to have occurred. It can apply to a Councillor even after he or she ceases to hold office.

Firstly, a Councillor may not misuse his or her position, including, but not limited to:

- Making improper use of information acquired as a result of the position he or she held or holds,
- Disclosing information that is confidential under section 77 of the Act,
- Directing or improperly influencing a member of Council staff, or trying to do so, in contravention of section 76E of the Act,
- Exercising or performing, or trying to exercise or perform, a power, duty or function that he or she is not authorised to exercise or perform, or
- Using public funds or resources in a manner that is improper or unauthorised.

Secondly, the misuse of position must be:

- To gain or attempt to gain, directly or indirectly, an advantage for themselves or for any other person, or
- To cause, or attempt to cause, detriment to the Council or another person.

A breach of any of the provisions relating to improper direction, confidentiality, or conflict of interest may constitute a misuse of position under section 76D if the second criterion applies.

1.3.2 Improper direction

Section 76E of the Act states that a Councillor must not improperly direct or influence a member of Council staff in the exercise of any power or in the performance of any duty or function by that staff member. Nor must they attempt to do so. In addition, a Councillor must specifically not direct or seek to direct a staff member:

- In the exercise of a delegated power, duty or function,
- In the exercise of a power, duty or function as an authorised officer under any Act,
- In the exercise of any power duty or function that the staff member exercises in an office or position held under another Act, or
- In relation to advice provided to the Council or a special committee.

This is an important rule that follows from the nature of local government. A broad range of powers are given to Councils under many Acts. These powers are given to the Council as a whole and an individual Councillor only exercises powers when he or she votes in a Council or special committee meeting. An individual Councillor does not have the legal authority to instruct a member of Council staff or to direct the Council administration.

1.3.3 Breach of confidentiality

Section 77 provides that a Councillor must not release information that he or she knows, or should reasonably know, is confidential. The section also sets out the ways in which information is made confidential. This includes where:

- The CEO has designated the information confidential for a period of 50 days,
- The information is provided to a meeting that is closed to the public, or
- The Council has designated the information “confidential”.

1.3.4 Conflict of interest

Sections 77A to 80A of the Act require Councillors to disclose conflicts of interest:

- In Council meetings,
- In meetings of special committees,
- In audit committees and section 223 committees, and
- In meetings that are classified as assemblies of Councillors.

Conflict of interest matters are the subject of a separate comprehensive Guide, “Conflict of Interest in Local Government”, published by Local Government Victoria in February 2009. This is available on the internet at www.localgovernment.vic.gov.au or from Local Government Victoria.

1.3.5 Register of interests

Section 81 of the Act requires every Councillor to lodge a “primary return” when first elected and thereafter to lodge an “ordinary return” every six months while in office. These interest returns record certain private interests that may give rise to conflicts of interest.

1.3.6 Possible proceedings

Breaches of each of the above laws may be subject to different proceedings and findings.

Sections 76E and 77 of the Local Government Act 1989 deal with conduct which, if engaged in by a Councillor, will undermine effective Council administration and the professional trust and respect that should be observed by Councillors to each other and to Council staff. Neither of these sections contains a penalty in itself. However, a breach of either section may be grounds for an application to a Councillor Conduct Panel or to VCAT for serious misconduct.

The following breaches may be the subject of an investigation by an inspector of municipal administration, possibly resulting in an application to VCAT for gross misconduct or with a Councillor being charged with an offence in Court:

- A misuse of position under section 76D (which can include a serious breach of section 76E or 77),
- A conflict of interest breach under section 79 or section 80A, or
- A failure to lodge an interest return under section 81, or a failure to disclose relevant information in a return.

The types of proceedings that may arise in each case are summarised in the following table.

	VCAT		Court
	Serious Misconduct	Gross Misconduct	Guilt / Conviction
Misuse of position		✓	✓
Improper direction	✓		
Breach of confidentiality	✓		
Conflict of interest		✓	✓
Register of interests		✓	✓

1.4 Consequences of findings

The following findings may be made by a Councillor Conduct Panel or VCAT:

- A Panel or the Tribunal may make a finding of misconduct against a Councillor.
- A finding of serious misconduct may be made by the Tribunal following a referral from a Councillor Conduct Panel.
- A finding of gross misconduct may be made by the Tribunal following an application from the Secretary of the responsible Government Department.

The Act provides that a Panel or Tribunal can impose disciplinary consequences on a Councillor who is subject to one or more of these findings. The range of possible consequences in each case matches the nature and seriousness of the relevant finding.

1.4.1 “Misconduct” finding

A Councillor against whom a finding of misconduct is made may be:

- Reprimanded,
- Directed to make an apology in a form or manner determined by the Panel or Tribunal, or
- Directed to take leave of absence for a specified period of up to two months, commencing on a date determined by the Panel or Tribunal.

A Councillor who is required to take leave of absence continues to be a Councillor but must not perform the duties or functions of a Councillor during the period of leave. If a Mayor is required to take a leave of absence, he or she is, for the duration of the leave, to be considered as incapable of acting under section 73(3) of the Local Government Act 1989 and the Council must appoint one of the Councillors to be Acting Mayor.

A Councillor required to take leave of absence continues to receive a Councillor allowance but is not entitled to be reimbursed expenses for the period. In addition, the Council may require the Councillor to return Council equipment and materials during the period of leave.

1.4.2 “Serious misconduct” finding

If VCAT finds that a Councillor has engaged in conduct that constitutes serious misconduct it may make any or all of the following orders:

- That the Councillor is suspended from office for a specified period of up to six months,
- That the Councillor is ineligible to hold the office of Mayor for a specified period of up to four years, or
- That the Councillor is ineligible to chair a special committee of the Council for a specified period of up to four years.

A Councillor who is suspended from office ceases to be a Councillor for the term of that suspension. A suspended Councillor must also observe the provisions of section 66A of the Act, which states that a suspended Councillor is not entitled to receive a Councillor allowance for the term of the suspension and must return all Council equipment and materials to the Council at the start of the beginning of the period of suspension.

If a suspended Councillor is the Mayor at the time of suspension, he or she ceases to hold that office, under section 72(1)(ba) of the Act, and the Council must elect another Councillor to be the Mayor.

In addition, if a Councillor is subject to a finding of serious misconduct by a Tribunal, that Councillor is automatically ineligible to hold the office of Mayor for the remainder of the Council’s term of office unless the Tribunal expressly orders otherwise. If the Councillor is the Mayor at the time, his or her position becomes vacant and the Council must elect another Councillor to be the Mayor.

1.4.3 “Gross misconduct” finding

If VCAT finds that a Councillor has engaged in conduct that constitutes gross misconduct it may make any or all of the following orders:

- That the Councillor is disqualified from holding office as a Councillor for a specified period of up to four years and his or her office is vacated,
- That the Councillor is suspended from office for a specified period of up to six months, or
- That the Councillor is ineligible to hold the office of Mayor for a specified period of up to four years.

Similar to a finding of serious misconduct, a Councillor subject to a finding of gross misconduct is automatically ineligible to hold the office of Mayor for the remainder of the Council’s term of office unless otherwise ordered by the Tribunal.

1.4.4 Summary of findings and consequences

The following table summarises the different orders that may be made following a finding of misconduct, serious misconduct or gross misconduct.

	Misconduct	Serious Misconduct	Gross Misconduct
Reprimand	√		
Required apology	√		
Leave of absence	√		
Suspension		√	√
Mayoral ineligibility		√	√
Chair ineligibility		√	
Disqualification			√

2. Internal Council Processes

Each Council is a separate legal entity and local government as a whole is recognised in the Victorian Constitution as a distinct and essential tier of government.

The Councillor conduct arrangements are based on the view that Councils are accountable to their communities and, as far as practicable, should be able to manage their own conduct.

2.1 Councillor Codes of Conduct

Section 76C of the Act requires each Council to have a “Councillor Code of Conduct” and to review its Code within 12 months after each general election. Aside from the Councillor conduct principles, the content of a Code is up to each Council to determine.

2.1.1 Codes must include the principles

Every Council must ensure that its Councillor Code of Conduct includes the Councillor conduct principles. Even if a Council omits the Principles from its Code, the Act deems the Principles to be included anyway. This is to ensure that consistent standards are set and that all Councillors have an equal right to apply for a hearing by a Councillor Conduct Panel in respect to alleged breaches of the Principles.

2.1.2 Internal dispute resolution processes

A Council’s Code of Conduct may include processes for resolving disputes between Councillors, including matters relating to Councillor conduct.

While it is recommended that each Council include a suitable process in its Code, it is ultimately up to each Council to decide whether or not to do so. It should be noted however, that a Council that does not include an internal dispute resolution process in its Code may be effectively foregoing its ability to manage certain of its own affairs (See Part 2.2).

2.1.3 Other material on codes

The Act states that a Code may include any other matters relating to the conduct of Councillors that the Council considers appropriate. It is expected each Council will include additional matters of its own, which may include procedures relating to the proper conduct of Councillors in the course of Council business. The Act also provides for a Councillor Code of Conduct to include any other matters prescribed for the purpose in the Regulations. At the time of publication, no matters have been prescribed.

It should be noted that, while the Act gives Councils some flexibility in formulating their Codes of Conduct, it also specifies that a Councillor Code of Conduct will be inoperative to the extent that it is inconsistent with any Act or regulation. Significantly, a Councillor Code of Conduct must not deal with the conduct of staff, as this is a matter for the Chief Executive Officer to address in the Code of Conduct for Council staff under section 95AA of the Act.

2.2 Internal dispute resolution

A Council's internal dispute resolution process should be the first formal step that is taken when there is a dispute between Councillors that has the capacity to undermine the effective operation of the Council.

2.2.1 Nature of process

While there is no prescribed process, the review of Councillor Codes of Conduct in March 2006 identified some common features of existing codes:

- The most common feature of Councillor Conduct Codes was provision for the involvement of an external mediator. Generally provision for an external mediator was envisaged when a situation had escalated to a level where it was warranted and usually only following an appropriate Council resolution.
- Many Councils provided for an earlier step in the process, before engaging an external mediator, which involved internal mediation. In some cases the Mayor was tasked with the responsibility to undertake such mediation or, where the Mayor was involved in the dispute, another Councillor would take on that role.

Depending on circumstances and preferences, Councils may wish to include both or either of these types of processes, or they may wish to retain processes in their existing codes. The current statutory arrangements may influence the particular types of processes adopted by Councils. For example, a Council might decide that external mediation is no longer required as part of their process now that there is provision for independent Councillor Conduct Panels.

2.2.2 Impact on Panel processes

Where a Councillor Code of Conduct contains a dispute resolution process, it is expected that it will be used to attempt to resolve any dispute before applying for a Councillor Conduct Panel. If a Council's internal process fails to resolve a dispute or is unable to deal with a particular matter, an application may be made to have the matter considered by a Councillor Conduct Panel.

If an applicant, other than the Council, does not show why the matter cannot be resolved through internal dispute resolution processes a Panel may dismiss the application (See Part 3.3.1).

3. Councillor Conduct Panels

The Councillor Conduct arrangements provide for three levels of dispute resolution. These are a Council's own internal dispute resolution processes, independent Councillor Conduct Panels and VCAT.

This Chapter describes how Councillor Conduct Panels work and Chapter 4, which follows, describes some of the administrative arrangements for Panels. VCAT's roles are described in Chapters 5 and 6.

3.1 What is a Councillor Conduct Panel?

A Councillor Conduct Panel comprises two independent persons appointed from lists maintained by the MAV. One of the members will be a legal practitioner with at least five years experience in legal practice. The other member will be a person with relevant experience in municipal governance.

3.1.1 Supporting Councils

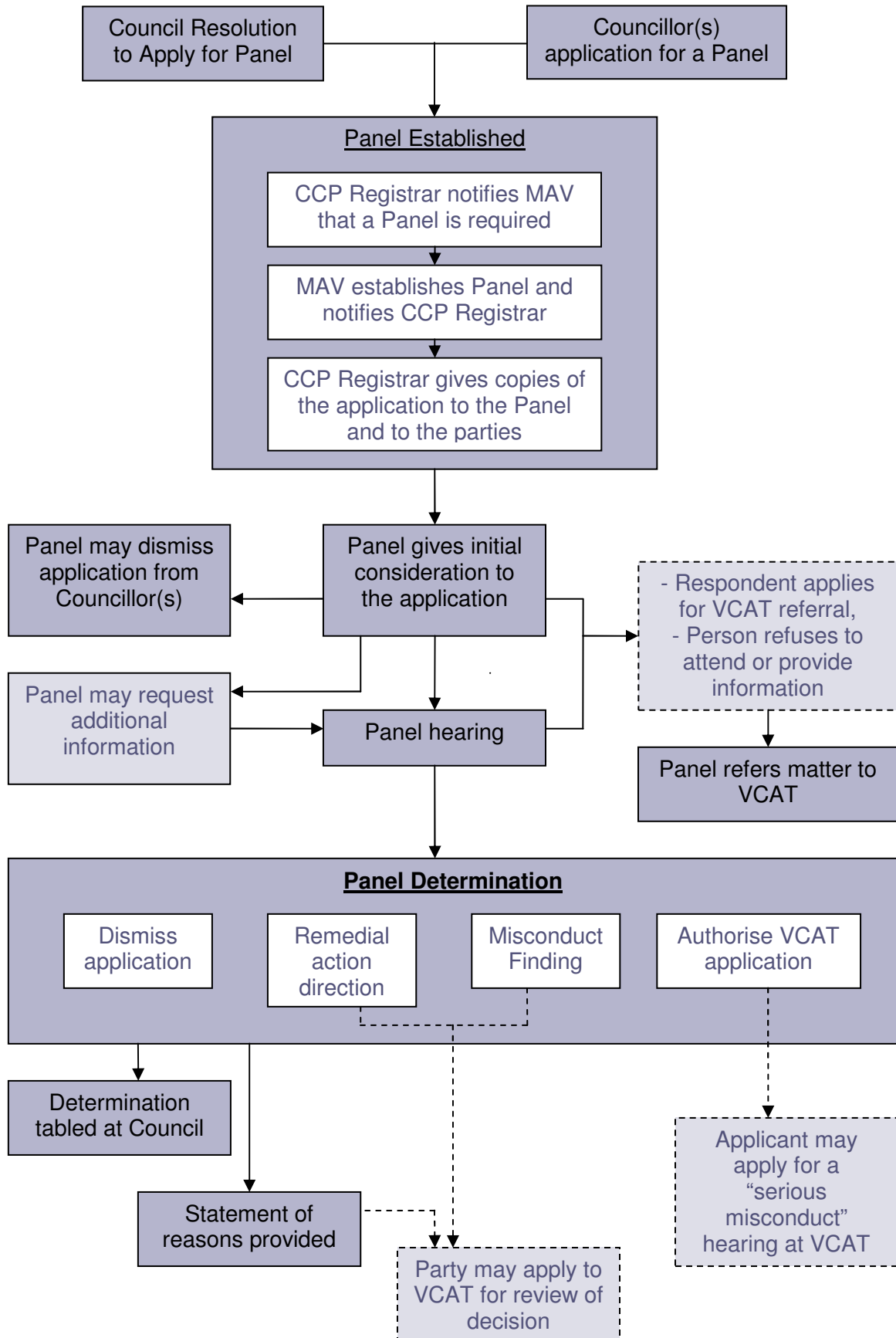
It is the role of a Councillor Conduct Panel to hear or to otherwise deal with applications seeking the resolution of an issue relating to a particular instance of conduct on the part of an individually named Councillor that has not been, or cannot be, resolved using the Council's internal dispute resolution processes.

Councillor Conduct Panels are intended to function within the local government sector.

- A Panel can only be established following a resolution of the Council or an application by a Councillor or group of Councillors,
- A Panel is established from lists of members maintained by the Municipal Association of Victoria,
- A Panel has disciplinary powers in relation to breaches of the Councillor Code of Conduct which has been adopted by the relevant Council,
- A Panel can require remedial action to be undertaken by a Councillor to assist good governance at the Council,
- Panels conduct hearings in the municipal area of the Council for which they are appointed,
- Panel costs and administrative needs are met by the relevant Council, and
- Panel decisions are tabled in Council meetings and become part of the Council records.

While the purpose of a Councillor Conduct Panel is to support a particular Council, it remains an independent body that operates under rules laid down in the Act.

Councillor Conduct Panel – Process Summary



3.2 Application for a Panel

Section 81B of the Act provides that an application to a Councillor Conduct Panel can be made by either:

- a Councillor,
- a group of Councillors, or
- a Council.

All applications for Councillor Conduct Panels must be lodged with and handled by the Council's CCP Registrar (See part 4.4.2). The manner in which an application can be made depends upon which of the three categories of persons mentioned above, makes the application.

The Appendix summarises information that should be provided in an application for a Councillor Conduct Panel.

3.2.1 Content of application

Under section 81B of the Act, every application for a Panel must include the following information:

- The ground or grounds for the application,
- The circumstances, actions or inactions of the Councillor whose conduct has prompted the application and is alleged to constitute misconduct or serious misconduct, and
- If the Councillor Code of Conduct includes processes for resolving internal disputes between Councillors,
 - the reasons why the matter cannot be resolved by those processes, or
 - if those processes were used, the reasons why the matter was not resolved through those processes.

When describing the grounds of an application, the applicant should:

- Indicate whether the application is for a finding of misconduct or for authority to make an application to VCAT for a finding of serious misconduct,
- Describe the type of action that is alleged to be misconduct or serious misconduct by reference to Section 81A of the Act (See Part 1.2), and
- State which provisions of the Councillor Code of Conduct, Councillor conduct principles and/or the Act are alleged to have been breached.

When describing the circumstances, actions or inactions, the application should describe these specifically in relation to the grounds on which the application is made. It is not necessary to include detailed evidence in an application, but a

Council or Councillor making an application must be prepared to provide evidence in support of any allegations to the Panel when requested to do so.

For example, Councillor X makes an application for a Councillor Conduct Panel on the basis that Councillor Y has breached the Councillor Code of Conduct. The application:

- Refers to the definition of misconduct in section 81A which includes conduct that is in breach of the Councillor Code of Conduct,
- Indicates that the application it is based on a breach of the Councillor conduct principle requiring Councillors to treat all persons with respect,
- Describes the actions of Councillor Y that are alleged to breach the principle, which in the particular case are alleged acts of bullying and intimidation towards Councillor X, and
- States that the internal dispute resolution process had been ineffective because Councillor Y refused to participate in internal mediation.

3.2.2 Application by a Council

A Council as a whole can make an application to a Councillor Conduct Panel. This must be done by Council resolution.

An application by a Council must include the name and address of the Councillor whom the Council has appointed as its representative for the purposes of the application. This Councillor will have the responsibility of representing the Council in the Councillor Conduct Panel hearing.

3.2.3 Application by an individual Councillor

An individual Councillor wanting to make an application to a Council Conduct Panel must lodge that application with the Council's CCP Registrar.

If the application does not give a sufficient explanation as to why the matter cannot be resolved by the Council's internal dispute resolution processes, a Councillor Conduct Panel can dismiss the application without conducting a hearing.

3.2.4 Application by a group of Councillors

A group of Councillors can make an application to a Councillor Conduct Panel. The application must be lodged with the Council's CCP Registrar.

The application must include the name and address of one of the members of the group who has been appointed by the group as its representative. This Councillor will have the responsibility of representing the group if the Councillor Conduct Panel convenes a hearing.

If the application does not give a sufficient explanation as to why the matter cannot be resolved by the Council's internal dispute resolution processes, a Panel can dismiss the application without conducting a hearing.

3.2.5 Copies of the application

The CCP Registrar must, without undue delay, ensure that a copy of the application for a Panel is provided to all the parties (See Part 3.4.1).

When the CCP Registrar has been notified of the members of the Panel (See part 4.2) he or she must, as soon as possible, provide the members with copies of the application. It is advisable that the Panel members also be provided with copies of the Councillor Code of Conduct.

The CCP Registrar must not provide a copy of the application or any other relevant document to any person other than in accordance with the Act unless the Councillor Conduct Panel instructs the CCP Registrar to do so.

3.3 Councillor Conduct Panel actions

This Part deals with actions that may be taken by a Panel after it receives an application. One of those actions is to conduct a hearing. Part 3.5 describes the decisions that may be made after a hearing has been conducted.

Actions that may be taken by a Panel are to:

- Dismiss the application,
- Join related applications,
- Refer the application to VCAT,
- Hear the application,
- Give notice of an apparent offence, or
- Suspend proceedings during an election.

3.3.1 Dismissing an application

A Councillor Conduct Panel cannot dismiss an application made by a resolution of Council unless a hearing has been conducted. However, it can, at any time, dismiss an application made by an individual Councillor or a group of Councillors if one of two following circumstances applies:

1. The application is frivolous, vexatious, misconceived or lacking in substance, or
2. Insufficient reasons have been given to explain why the matter cannot be resolved by internal dispute resolution processes.

If a Councillor Conduct Panel decides to hear the application it still has the power to dismiss the application if it becomes clear during the hearing that one of the circumstances set out above, applies.

3.3.2 Joining related applications

If after a Councillor Conduct Panel has been established, the CCP Registrar receives another application, which appears to be related to the existing application, the Registrar must forward that new application to the Councillor Conduct Panel. Based on the subject matter of the new application, the Panel must decide whether to join that application with the existing application it was established to consider, or return the new application to the CCP Registrar. If the Councillor Conduct Panel decides not to hear both applications jointly, the Registrar must take the required steps to establish another Councillor Conduct Panel to consider the subsequent application.

3.3.3 Hearing an application

Under section 81I of the Local Government Act 1989, a Councillor Conduct Panel cannot make a determination unless it has conducted a hearing on the application. Hearing procedures are described in Part 3.4 and the decisions that may be made are described in Part 3.5.

3.3.4 Referral to VCAT

Section 81D of the Act specifies certain circumstances when a misconduct application to a Council Conduct Panel is referred to VCAT:

- If the Councillor who is the respondent in the application applies to the Panel for a referral of the matter to VCAT the Panel must refer the matter to VCAT. A respondent may make an application at any time before the Councillor Conduct Panel determines the matter.
- A Councillor Conduct Panel may refer an application to VCAT if it considers that it cannot make a determination because a person fails to attend a Panel hearing or to provide information that the Panel has requested.

In the event of a referral to VCAT, the Panel must:

- Give a written notice to each of the applicant, the respondent, the relevant Council and the Minister that the matter has been referred to VCAT, and
- Provide a copy of the application and any additional documents that the Panel considers appropriate to VCAT.

When a matter is referred to VCAT in this way, the applicant in the original application becomes the applicant in the VCAT process and must be prepared to present the case to the Tribunal.

When a matter is referred to VCAT, in either of the ways described above, the Tribunal will not be limited to a finding of misconduct. It may make findings of misconduct, serious misconduct, or gross misconduct and it may specify the appropriate consequences that attach to its findings, (See Part 1.4). Alternatively, the Tribunal may dismiss the application.

3.3.5 Apparent offence

It is an offence to comply with some sections of the Act. In such cases, the Act prescribes a maximum penalty that may be imposed by a Court. Under section 81O of the Act, if it appears to a Councillor Conduct Panel that a Councillor has committed an offence under the Act, it must give written notice to that effect to the Secretary of the Department of Planning and Community Development as soon as it becomes aware of the apparent offence.

The Secretary of the Department of Planning and Community Development may require a Panel to suspend or stop its consideration of a particular matter, even if the Panel has not notified the Secretary of an apparent offence.

However, if the Secretary requires a Panel to suspend or to stop its consideration of a particular matter, the Secretary must refer the matter to an inspector of municipal administration for investigation under section 223B of the Act. The inspector must commence an investigation into the matter within 28 days of receiving the referral from the Secretary.

3.3.6 Matters during elections

Section 81N of the Act requires all applications and proceedings in Councillor Conduct Panels to be suspended during the election period for a general election. The "election period" is defined in section 3(1) of the Act to be the period of 32 days from the last day of nominations until the election day.

If the Councillor who was the subject of the complaint (the respondent) is not returned to office as a Councillor in the election, the application lapses and the Panel process ceases.

If the Councillor who is the subject of the complaint is returned to office in the election, the application may resume, whether or not the person or persons who made that application are themselves returned to office as a result of the election. Of course, the applicant may not wish to proceed and can apply to the Panel to withdraw the application.

3.4 Panel hearings

If a Councillor Conduct Panel decides to hear an application it must fix a time and a place for the hearing and it must notify by post the applicant, the respondent and the relevant Council of the time and place of the hearing.

The place chosen by the Councillor Conduct Panel for the hearing must be within the municipal district of the relevant Council unless the Panel considers that it is necessary or appropriate in the circumstances for the hearing to be conducted at a place outside that municipal district.

3.4.1 Parties to a Panel hearing

The parties to a Councillor Conduct Panel hearing are:

- The applicant, being an individual Councillor, a group of Councillors, or the Council, and
- The respondent, being the Councillor whose conduct has prompted the application to the Councillor Conduct Panel.

In the case of an application by a Council or a group of Councillors, the Councillor nominated as the representative of the Council or the group is responsible for representing the Council or group in any Panel or Tribunal hearings on the matter.

3.4.2 Hearing procedures

Section 81I of the Act provides for hearings to be with as little formality and technicality as the requirements of the Act and the proper consideration of the matter allow. It specifically states that, in conducting a hearing, a Panel's procedures are at its own discretion. The Act also states that a Panel is not bound by the rules of evidence, like a Court, but may inform itself in any way that it thinks fit.

Nevertheless, even though hearings are relatively informal, every Councillor Conduct Panel is bound by the rules of natural justice. This means that a Panel must allow a person to present his or her side of the story and it must make decisions in an objective and unbiased way. Section 81I(3) expressly states that a Panel must give the respondent an opportunity to be heard.

The hearing must not be open to the public. This requirement is intended to assist Panels to resolve matters between Councillors, where possible, in ways that may not be possible when Councillors feel under the public gaze. However, in exercising its right to conduct procedures at its own discretion, a Panel may allow a Councillor or Councillors (or any other persons) to attend a hearing where it considers such attendance to be appropriate.

In keeping with the low level of formality of Panel hearings, the Act specifically states that no person appearing at a Panel hearing, has a right to be represented by a lawyer or anyone else unless the Panel considers that the person requires representation to ensure that the hearing is conducted fairly. This also ensures that a respondent cannot be disadvantaged by the greater ability of a Council to employ legal representation to present its case.

Section 81H of the Act gives a Panel the power to request a person to attend a hearing and answer questions. A Panel also has the power to request information from the applicant, the respondent or the Council.

A Panel cannot compel a person to comply with a request to attend a hearing or to provide information, but it can refer the matter to VCAT if it is unable to decide the matter because a person fails to comply with such a request. VCAT has greater powers to require a person to attend and give evidence in a matter.

The Panel can request confidential information held by a Council, but the members of the Panel must ensure that any such confidential information is not released to the public.

The CCP Registrar must attend hearings and assist the Councillor Conduct Panel (See part 4.4.2).

3.4.3 Informing the parties of the decision

The result of a Panel hearing is reported in two stages, the “decision” and the “reasons”. This is described in section 81M of the Act.

Once a Councillor Conduct Panel has made a determination under section 81J, the Panel must give a copy of the decision to the Council, the parties to the application and the Minister. A copy of the decision given to the Council must be tabled at the next ordinary meeting of the Council and recorded in the minutes for that meeting.

A Councillor Conduct Panel must give a written statement of reasons for the decision, within 28 days of making a determination, to the Council, the parties to the application and the Minister. This is not required to be tabled at the Council meeting.

This statement of reasons is deemed to meet the requirements of section 46(1) of the VCAT Act for the purpose of any application to VCAT for a review of a Panel’s decision (See Part 6.1).

3.5 Councillor Conduct Panel decisions

At the conclusion of a hearing, a Councillor Conduct Panel may:

- Make a finding of misconduct against a Councillor,
- Authorise the applicant to make an application to VCAT,
- Make a finding that remedial action is required,
- Dismiss the application.

3.5.1 Finding of misconduct

A Panel may make a finding of misconduct against a Councillor. After a finding of misconduct, a Panel may reprimand the Councillor, require the Councillor to make an apology and/or require him or her to take up to two months leave of absence, as described in Part 1.4.1.

If a Councillor fails to comply with a direction of a Panel, following a finding of misconduct, a Panel may authorise an application to VCAT for a finding of serious misconduct.

3.5.2 Authorisation for VCAT application

A Panel may authorise the applicant to take the application to VCAT if it considers that there are reasonable grounds on which a Tribunal may make a finding of serious misconduct. The grounds of a serious misconduct finding are listed in Part 1.2.2. If this happens, the applicant may make an application to VCAT for a serious misconduct finding. The applicant is not compelled to make the application to VCAT.

A Panel cannot make a finding of misconduct and authorise an application to VCAT. It can do one or the other or neither.

3.5.3 Remedial Action

It is open to a Councillor Conduct Panel to make a finding that remedial action is required in relation to the conduct of the Councillor regardless of whether or not the Panel makes a finding of misconduct.

Where the Panel makes a finding that remedial action is required it may direct the Councillor who is the subject of the application to attend mediation, training or counselling. The Panel may set reasonable conditions in respect of how or when remedial action is to be undertaken. Any necessary expenses incurred by Councillors in attending mediation, training or counselling must be paid by the Council.

A Panel cannot require remedial action if it authorises an application to VCAT. However, after it has considered the application, the Tribunal may refer the matter to a Panel to determine appropriate remedial action.

3.5.4 Code amendment

Regardless of whether or not any other finding is made, a Councillor Conduct Panel may direct that the Council amend its Councillor Code of Conduct in a particular way or to address a particular issue. For example, a Panel might consider a provision in a Code to be contrary to a Provision of the Act or inconsistent with the roles and functions of Councils and Councillors.

If a Councillor Conduct Panel directs the Council to amend its Councillor Code of Conduct, the Council must comply with that direction within 3 months of the direction being made.

4. Panel Administration

4.1 Lists of Panel members

The responsibility to establish Councillor Conduct Panels rests with the Municipal Association of Victoria (MAV).

4.1.1 List A and List B

The MAV must establish and maintain 2 lists, to be known as List A and List B, of eligible persons from which members of a Councillor Conduct Panel must be selected.

- List A, must include at least 5 persons who are local legal practitioners and have held a local practising certificate for at least five years.
- List B, must include at least 7 persons with relevant experience in municipal governance.

It is a matter for the MAV to decide how often to update the Lists and how long members stay on lists. However, once a person has been appointed to List A or List B, he or she must not be removed from that list for a period of 2 years unless the person resigns from or is removed from the List in accordance with the Act (See Part 4.1.2).

4.1.2 List eligibility

The following people are not eligible to be members of List A or List B:

- A person who has been convicted of an offence specified in section 29 of the Act (See Part 6.2.1),
- A person who is an undischarged bankrupt or has property that is subject to control under the law relating to bankruptcy, or
- A person who is, or has been in the last three years, an employee, contractor or member of the board of management of the MAV or any other body that represents the interests of Councils, Councillors or Council staff.

If the MAV considers that a person on List A or List B is no longer a fit and proper person to be on that list, the MAV may apply to the Minister for the Minister's consent to remove the person from the list. In determining whether to consent to the removal of a person from a list, the Minister must have regard to the principles of natural justice and whether the person is a fit and proper person to sit on a Councillor Conduct Panel. If the Minister consents to the removal of a person from a list, the MAV must remove that person from the list.

4.1.3 List notification

Once the MAV has selected or updated the Lists of members it must notify all Councils in writing of the following information at least 30 days before the persons are appointed to Lists A and B:

- The names of the people on each List,
- The order of the names on each List,
- The process used by the MAV in selecting the persons for the Lists, and
- The schedule of fees set for Panel Members.

The MAV must publish List A and List B on the Internet website maintained by the MAV and ensure that the order of names in each list appears in the same order of which Councils were advised.

4.2 Establishing and dissolving Panels

On receiving an application by an individual Councillor or a group of Councillors, or on being notified of an application in the form of a Council resolution, the Council's CCP Registrar must act without undue delay to take steps to establish a Councillor Conduct Panel. The CCP Registrar does this by notifying the MAV that a Councillor Conduct Panel is required.

4.2.1 Establishing a Panel

When the MAV receives a notification from a CCP Registrar that a Councillor Conduct Panel is required, it must select a person from List A (persons with legal qualifications) and a person from List B (persons with local governance experience) to form a Panel. The person selected from List A is the chairperson for the Councillor Conduct Panel.

On the first occasion that a Panel is required, the MAV must select the person at the beginning of each list to form a Panel. On the second or subsequent occasion, the MAV must select the next person (after the person who has most recently been selected) on each list to form a Panel. This process is to ensure that the process of selecting members for any particular Panel is impartial and transparent.

In making the selections the MAV must act without undue delay and must notify the CCP Registrar of the members selected for the Councillor Conduct Panel as soon as possible after the selection has been made.

If it is not possible to establish a Councillor Conduct Panel using the persons appointed to List A and List B, the MAV may recommend to the Minister a person or persons the MAV considers to be suitable to be a member or members of a Councillor Conduct Panel. The Minister may approve the person or persons so recommended to be on a Councillor Conduct Panel.

As soon as he or she is notified by the MAV of the members of the Panel, the CCP Registrar must provide those members with copies of the application.

4.2.2 Panel costs and support

It is the responsibility of the relevant Council to pay the costs of Panel hearings, including paying the Panel members in accordance with the schedule of fees set by the MAV. In addition, the CCP Registrar provides administrative support for Panel hearings (See Part 4.4.2).

4.2.3 Dissolution of a Panel

A Councillor Conduct Panel is dissolved once the Panel has:

- Dismissed an application,
- Referred the matter to VCAT,
- Given notice of its decision and provided a statement of reasons,
- Been stopped by the Secretary (See Part 3.3.5).

If a Panel has been dissolved and the matter subsequently requires further consideration by a Panel, such as when VCAT refers the matter back to a Panel for a decision on remedial action, a new Panel must be established.

4.3 Panel members

4.3.1 Panel members' eligibility

A person selected to be a member of a Councillor Conduct Panel must excuse himself or herself:

- If he or she has been a Councillor, employee, consultant or contractor of the relevant Council at any time in the preceding five years,
- If he or she has a close personal or professional relationship with any Councillor of the relevant Council,
- If he or she has a conflict of interest of any kind, or
- If he or she has become ineligible to be on List A or List B. (See Part 4.1.2).

A person selected to be a member of a Councillor Conduct Panel may excuse himself or herself if he or she is unavailable at the time the Panel must hear and deliberate the matter.

If a Panel member excuses himself or herself for any of the reasons set out above, he or she must provide written reasons to the MAV. If a Councillor Conduct Panel member excuses himself or herself the MAV must select the next person that appears on the list after the excused Panel member.

4.3.2 Immunity of Panel members

Clause 13 of Schedule 5 of the Act provides that a member of a Councillor Conduct Panel is not personally liable for anything done or omitted to be done in good faith in the exercise of a power or the discharge of a duty under the Act in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under the Act. Any liability resulting from an act or omission that would attach to a member of a Councillor Conduct Panel if they were not immune under this provision, attaches to the Council.

4.4 Council administration

4.4.1 Role of the CEO

The Chief Executive Officer of a Council must appoint, in writing, a member of Council staff to be the CCP Registrar. The CCP Registrar may not be the CEO.

It is the responsibility of the CEO to ensure that the members of a Councillor Conduct Panel are paid in accordance with the schedule of fees set by the MAV.

The CEO must also ensure the sealed records of each Councillor Conduct Panel are stored safely and made accessible only at the request of the Tribunal, a Court or an inspector of municipal administration for a period of seven years after the conclusion of the matter to which the records relate.

4.4.2 Duties of the CCP Registrar

The CCP Registrar for each Council is responsible for commencing the processes to establish a Councillor Conduct Panel in each of the following circumstances:

- On receipt of an application lodged by a Councillor or group of Councillors,
- Following a resolution of a Council to apply for a Councillor Conduct Panel, or
- Following a referral for remedial action or code amendment by VCAT (See Part 5.4.2).

In taking steps to establish a Panel, the CCP Registrar must act without undue delay.

In addition to his or her responsibilities in establishing Councillor Conduct Panels, the CCP Registrar must also attend all Councillor Conduct Panel hearings, keep a written record of those hearings, keep copies of all documents requested by, and given to, a Councillor Conduct Panel and ensure that venues and resources are made available for hearings conducted by, and deliberations of, a Councillor Conduct Panel.

At the conclusion of a Councillor Conduct Panel process, the CCP Registrar must seal the records of the Panel and give them to the CEO.

The CCP Registrar must not provide a copy of an application or referral or any other document relevant to a matter to any person, other than in accordance with the Act, unless a Councillor Conduct Panel instructs the CCP Registrar to do so.

See also:

- Part 3.2 in regard to the lodgement of Panel applications,
- Part 3.2.5 in regard to distribution of copies of applications,
- Part 3.3.2 in regard to related applications, and
- Part 4.2 in regard to the process of establishing a Panel.

5. VCAT – Misconduct Proceedings

5.1 Roles of VCAT

The Act gives VCAT a number of roles in relation to Councillor misconduct. The Tribunal can:

- Hear a Councillor misconduct matter referred to it by a Councillor Conduct Panel,
- Hear a serious misconduct matter on an application authorised by a Councillor Conduct Panel, and
- Hear a gross misconduct matter on application from the Secretary of the Department of Planning and Community Development.

In addition, the Tribunal may hear certain other related matters, including an application for review of a Panel decision. These other roles are described in Chapter 6.

5.2 Applications to VCAT

5.2.1 Misconduct application

As described in Part 3.3.4, there are two circumstances when a matter before a Councillor Conduct Panel is referred to VCAT:

- The respondent may apply to the Panel for the matter to be referred to VCAT. If this happens the Panel must make the referral.
- A Panel may refer a matter to VCAT if the Panel considers that it cannot make a determination on an application because a person refuses to attend a Panel hearing or to provide information that the Panel has requested.

The applicant in the Panel application (Council, Councillor or Councillors) will then become the applicant in the VCAT process and will need to present the case in the Tribunal.

As previously mentioned, VCAT is not limited to the finding sought in an application. The Tribunal may make a finding of misconduct, serious misconduct or gross misconduct after hearing an application, irrespective of the nature of the application.

5.2.2 Serious misconduct application

As described in Part 3.5.2, a Councillor Conduct Panel may authorise an application to VCAT on grounds of serious misconduct if it considers that there are reasonable grounds on which a Tribunal may make a finding of serious misconduct.

It is up to the applicant to subsequently make the application to VCAT. Only a Council, a Councillor or a group of Councillors may be applicants to VCAT on grounds of serious misconduct.

Applicants should contact VCAT directly for advice about how to make an application.

5.2.3 Gross misconduct application

Under section 81E of the Act, the Secretary of the Department of Planning and Community Development can make an application direct to VCAT in relation to the conduct of a Councillor that the Secretary considers may constitute gross misconduct. Applications alleging gross misconduct can be made only by the Secretary of the Department and heard by VCAT.

A gross misconduct hearing may consider the fitness of a person to continue to be a Councillor and an adverse finding may result in the relevant person being disqualified from being a Councillor at any Council for a period of up to four years.

5.2.4 Parties to a VCAT proceeding

In applications for misconduct or serious misconduct, the parties to the matter automatically include:

- The applicant, being the Council, Councillor, or group of Councillors who lodged the application, and
- The respondent Councillor about whom the application is made.

In addition, the Council or the Department of Planning and Community Development may apply to the Tribunal to be joined as parties to the proceedings.

In an application for gross misconduct, the parties are limited to the Department and the respondent Councillor.

5.3 Tribunal procedures

5.3.1 Composition of the Tribunal

When hearing an application for a finding of misconduct, serious misconduct or gross misconduct the Tribunal will comprise two members who are:

- A senior member of VCAT who has been admitted to legal practice, and
- A person with at least five years experience in local government governance matters.

5.3.2 Hearing procedures

The procedures to be followed by the Tribunal in hearing misconduct matters are specified in Part 5 of the VCAT Act. This includes the power to require a Party to pay some or all of the costs of another party. Unless the Tribunal otherwise orders, the costs in a misconduct or serious misconduct hearing will be borne by the Council.

5.3.3 Tabling of Tribunal decisions

Under section 81M(5) of the Act, a record of the decision of the Tribunal, made in respect of an application or review, must be tabled at the next ordinary meeting of the Council and recorded in the minutes of that meeting.

5.3.4 Matters during elections

Applications made to VCAT for findings of misconduct, serious misconduct or gross misconduct are suspended during the electoral period for a Council election.

Where the application is for a finding of misconduct or serious misconduct:

- If the respondent Councillor is returned to office as a Councillor then the application may resume, whether or not the person or persons who made that application are themselves returned to office as a result of the election, or
- If the respondent Councillor is not returned to office the application lapses.

An application for a finding of gross misconduct must resume after the general election is held, regardless of whether or not the respondent is returned to the office as a Councillor.

5.4 VCAT findings

5.4.1 Types of Findings

Section 81K of the Act provides that when hearing an application for misconduct, serious misconduct or gross misconduct the Tribunal may make any of the following findings:

- That a Councillor has engaged in conduct that constitutes misconduct,
- That a Councillor has engaged in conduct that constitutes serious misconduct, or
- That a Councillor has engaged in conduct that constitutes gross misconduct.

These findings are available to the Tribunal irrespective of the grounds on which the application was made. The Tribunal must make its finding as it see fit having regard to the evidence.

A Tribunal may make more than one finding. For example, it may make findings of misconduct and serious misconduct against a Councillor if it considers both findings justified.

The consequences that follow from a Tribunal making a finding in relation to the conduct of a Councillor depend on whether it finds the conduct to constitute misconduct, serious misconduct or gross misconduct. The determinations that the Tribunal can make as a result of each of these findings are set out in Part 1.4.

5.4.2 Remedial action or Code amendment

The Tribunal cannot order remedial action to be taken or direct a Council to amend its Councillor Code of Conduct. However it can refer a matter for the consideration of a Councillor Conduct Panel if it considers that either:

- Remedial action is required, or
- The Councillor Code of Conduct of the relevant Council requires amendment.

It is open to the Tribunal to make this referral regardless of whether it also makes a finding in relation to that matter.

A new Panel must be formed to consider the matters referred by the Tribunal. The CCP Registrar must provide the Panel members with copies of the basis for the referral by the Tribunal as soon as possible.

A Councillor Conduct Panel that is formed to respond to a referral from VCAT may direct the respondent Councillor to attend mediation, training or counselling. The Panel may also set reasonable conditions in respect of how or when remedial

action is to be undertaken. Any necessary expenses incurred by the Councillor in attending mediation, training or counselling must be paid by the Council.

If the Councillor Conduct Panel directs the Council to amend its Councillor Code of Conduct, the Council must comply with that direction within three months of the direction being made.

6. VCAT – Other Roles

In addition to conducting misconduct hearings as described in Chapter 5, VCAT has a number of other related roles. These are:

- Hearing an application for review of a Panel decision,
- Considering an application that a Councillor charged with a relevant offence be required to take leave of absence, and
- Hearing an application for relief from disqualification from a person previously convicted of a relevant offence.

6.1 Review of Panel decision

6.1.1 Application for review

Under section 81Q of the Act, the applicant or the respondent to a Councillor Conduct Panel application, who is affected by the decision of the Panel, may apply to VCAT for a review of the Panel's decision.

VCAT may review a Panel decision:

- To make a finding of misconduct,
- To impose a disciplinary measure after a finding of misconduct, or
- To require a Councillor to undertake remedial action.

VCAT may not review a Panel decision:

- To dismiss an application because it is frivolous, vexatious, misconceived or lacking in substance, or
- To dismiss the application because insufficient reasons have been given to explain why the matter cannot be resolved by internal dispute processes, or
- To authorise or not authorise an application to VCAT on grounds of serious misconduct.

An application for review must be made within 28 days of the Councillor Conduct Panel giving its statement of reasons (See Part 3.4.3).

6.1.2 Composition of VCAT

An application to VCAT for a review of a Panel decision must be heard by a senior member of VCAT who has been admitted to legal practice.

6.1.3 Findings on review

The provisions of the VCAT Act apply to an application for review of a Panel decision.

When considering an application for review of a Councillor Conduct Panel decision, the Tribunal may:

- Affirm the decision of the Panel,
- Vary the decision of the Panel, or
- Set aside the Panel's decision and make another decision.

When considering an application for review of a Councillor Conduct Panel decision, the Tribunal cannot make a finding of serious misconduct or gross misconduct.

The Tribunal may award costs against a party.

6.2 Councillor charged with an offence

Under certain circumstances, a Councillor who has been charged with an offence under the Local Government Act or any other Act may be required to take leave of absence until the matter is decided in Court.

This can occur as a result of a Tribunal hearing and only after a Councillor has been charged with an offence that will disqualify him or her from being a Councillor if he or she is convicted of the offence.

6.2.1 Relevant charges

The type of convictions that will result in disqualification are:

- A conviction for misuse of position or conflict of interest under the Local Government Act,
- A conviction for one of a number of electoral offences under the Local Government Act, or
- A conviction for any offence under any Act that is punishable by imprisonment for five years or more upon first conviction if the offence was committed when at least 18 years of age.

Under section 29(2) of the Act, a person convicted of any of these offences is not capable of being a Councillor for a period of seven years after the conviction.

6.2.2 Application

Section 29(4) of the Act provides that if a Councillor is charged with one of these offences, the Secretary of the Department of Planning and Community Development may apply to VCAT for an order requiring the Councillor to take leave of absence until the matter is decided in Court. An application under this provision can only be made by the Secretary of the Department.

6.2.3 Tribunal decision

The Tribunal may order that a Councillor charged with a relevant offence must take leave of absence until proceedings in respect of the charge are fully determined. This generally means until the relevant Court has brought down its decision on the matter or the charge is withdrawn. The Tribunal can dismiss the application from the Secretary.

Before the Tribunal makes an order under this provision, it must have regard to the nature and circumstances of the relevant charge.

A Councillor who is required to take leave by a decision of the Tribunal continues to receive his or her Councillor allowance but may not act as a Councillor. The Council may require the Councillor to return any Council equipment during the period of leave.

Any order so made by the Tribunal ceases to have effect if the relevant charge is withdrawn or the Councillor is not convicted of the offence.

6.2.4 Leave during appeal

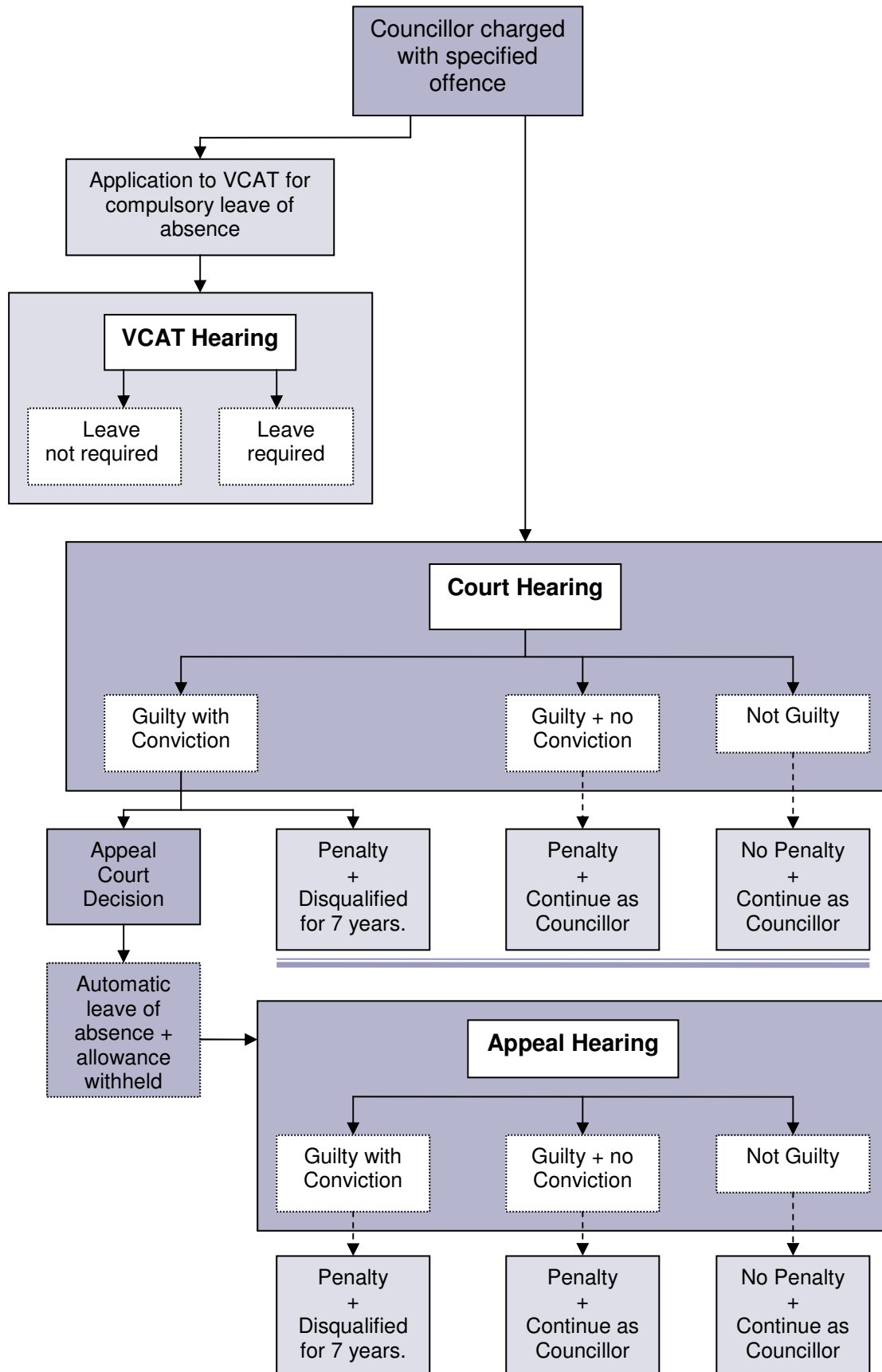
If a Councillor is found guilty and convicted of a relevant offence, he or she ceases to be a Councillor. However, if the Councillor appeals against the conviction to a higher Court, the conviction is stayed until the appeal is decided and the disqualification does not take effect until and unless the higher Court upholds the relevant conviction.

During the period from when the first Court brought down its decision until the appeal is decided, the Councillor is automatically on leave of absence. During that time, his or her Councillor allowance is withheld pending the result of the appeal. If the appeal is successful, the amount of the withheld allowance must be paid to the Councillor in full.

6.2.5 Leave and elections

A Councillor who is on leave of absence is not prevented from contesting a Council election during the period of leave. However, the period of leave continues until either the matter is finally resolved in the Courts, or the charge is withdrawn.

Councillor Charged with Specified Offence



6.3 Relief from disqualification

The Act provides an avenue by which a person, who previously became incapable of being a Councillor because of having been convicted of a relevant offence, may apply to have the period of disqualification reduced.

The normal period of disqualification is seven years. However, section 30 of the Act allows a person to apply to VCAT for relief from the disqualification after a period of four years.

6.3.1 Relevant considerations

The Tribunal may grant relief from disqualification if it is satisfied that the person is a fit and proper person to seek office as a Councillor having regard to:

- The nature of the offence that gave rise to the disqualification,
- The conduct of the person since the disqualification, and
- Any other relevant considerations.

6.3.2 Composition of the Tribunal

When considering an application for relief from disqualification, the Tribunal must comprise two members:

- A senior member who has been admitted to legal practice, and
- A person with at least five years experience in local government governance matters.

Appendix – Panel Application

An application for a Councillor Conduct Panel should include the following information.

General information

- ▶ The name of the Council.
- ▶ The name of the applicant or applicants (Being the Council, a Councillor or a group of Councillors).
- ▶ If the application is from a Council or a group of Councillors, the name and address of the Councillor who has been appointed to represent the Council or group.
- ▶ The name of the Councillor who is the subject of the application (the respondent).

Internal dispute resolution

- ▶ State:
 - Why the matter cannot be resolved using the dispute resolution process in the Councillor Code of Conduct, or
 - If the internal dispute process has been used, why that matter was not resolved.

The nature of the application

- ▶ State whether the application is seeking:
 - A finding of misconduct, or
 - Authority to make an application to VCAT for a finding of serious misconduct.
- ▶ State the ground or grounds for the application, including:
 - The basis of the allegation of misconduct or serious misconduct, by reference to the relevant definition in section 81A of the Act.
- ▶ Describe the circumstances, actions or inactions that are alleged to constitute misconduct of serious misconduct.

Additional information

- ▶ The application may include additional information, such as
 - A copy of the Councillor Code of Conduct,
 - Additional material in evidence (Note that any material included in the application will be provided to the respondent).