



LOCAL GOVERNMENT ACT REVIEW ►► DELIVERING FOR THE COMMUNITY

Consultation report – Interventions

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Introduction

The *Local Government Act 1995* (the Act) provides various interventions to regulate the conduct of local government officers and council members and sets out powers to scrutinise the affairs of local governments. These include powers of the Minister to establish an inquiry panel and suspend and dismiss councils and powers of the Director General of the Department of Local Government, Sport and Cultural Industries (Department) to refer allegations of serious or recurrent breaches to the State Administrative Tribunal or to commence prosecution for an offence under the Act. Local governments also have powers to enforce the Act, such as issuing infringement notices and entering premises.

There is a community expectation that the misconduct of local government officers, organisational dysfunction and governance issues within local governments are dealt with appropriately. This is achieved through balancing the ability of the State Government to intervene in local government matters and providing local governments with the ability to manage their own operations and affairs.

To guide discussions on whether there are opportunities for the State Government to work in partnership with local governments to improve their good governance and performance, and to better equip local governments to allow them to enforce the Act more effectively, the Department released a discussion paper. This paper provides an overview of the feedback received during the consultation period.

How we consulted

Following the release of discussion papers in September 2018, over 100 workshops, forums and meetings were held with community, local governments and stakeholders. This consultation included 28 community workshops across Western Australia and 'pop-up' stalls in shopping centres and community halls.

To ensure all Western Australians had an opportunity to have their say, multiple workshops were held in all Western Australia's regions.

The workshops provided an opportunity for attendees to discuss topics that were of interest to them. All attendees were also encouraged to provide a submission.

Individual council members, local government staff, peak bodies, community organisations, councils and community were invited to have their say by completing online surveys or providing a written submission.

The objective of the consultation was to seek the views of as many interested people as possible, rather than scientifically sampling the population. As a consequence, responses are from people with a keen interest in local government, either because of their working relationship or because of their experiences with local government (often their own).

Responses received

Overview

A total of 3,151 responses to the review were received. This was made up of surveys to each of the 11 discussion papers released, written submissions and informal 'post card' responses collected during workshops.

For every topic, residents/ratepayers provided the largest number of responses.

The gender balance amongst survey responses was reasonably representative (55% male, 45% female), but the sample was skewed heavily towards older age groups. Around 75% of respondents were aged 46 years or over, with nearly half over 55. Less than 12% were aged 35 or under.

Breakdown of responses on interventions

A total of 210 responses addressed the topic of interventions, which included 145 survey responses and 65 written submissions.

The 210 responses were drawn from private individuals and residents/ratepayers groups (75); local government councils and zones (50); council members (35); local government staff and chief executive officers (39); government agencies (3); peak bodies (2); members of parliament (1) and stakeholders from business and civil society (5).

What we heard

The following sections provide data on, and outline key messages in, the feedback received on the topic of interventions.

Respondents provided varied commentary related to interventions, often within the broader context of good governance. The power dynamic between council members and administration and conflict between council members and administration was a frequent theme in these responses.

There was overwhelming support for the Act to enable a person to be appointed to the administration or council as part of a remedial action process to address governance issues and dysfunction. An area of concern raised on several occasions in the submissions was the extent of the powers that an externally appointed person should have.

“An external appointee still needs to be accountable to the community, not just to the minister. How will the review accommodate this? An external appointee with an agenda can be just as damaging as a dysfunctional council. There should be a limit to what the external appointee can do until a proper functioning council is back in place. It should be a caretaker role where no far-reaching decisions can be made.” (Confidential response)

“A person appointed to intervene should not have the power to direct or override Council decisions. A Council must take full responsibility for its decisions and failure to follow the advice of the embedded appointee might result in the dismissal of the Council.” (Council member, Town of Claremont)

There was also widespread support for a number of other powers to support good governance.

Investigations and inquiries

The complaints process

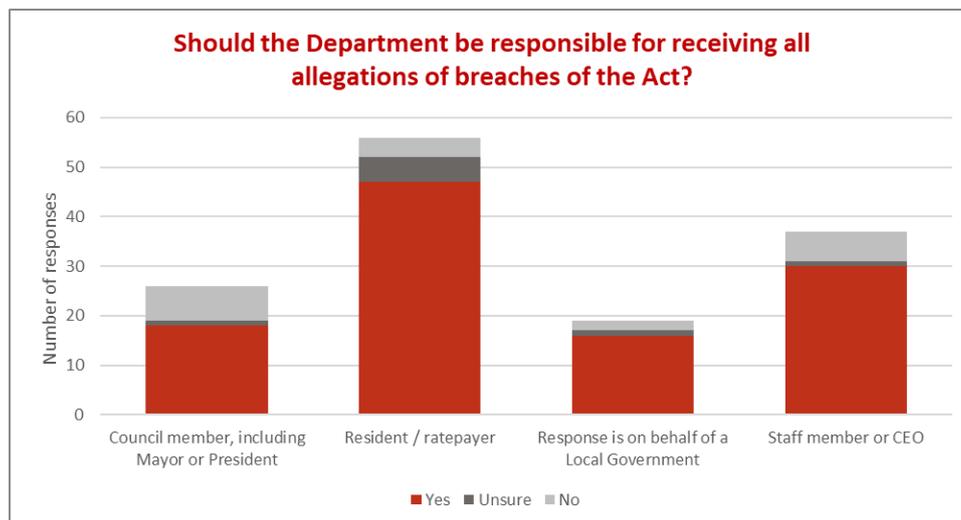
Currently, the process for lodging a complaint about an alleged breach of the Act differs depending on the type of breach involved. If a person believes that a council member has committed a minor breach (i.e. contravened a rule of conduct or local law), he or she may make a complaint to the complaints officer of the local government. The complaints officer is then responsible for referring the minor breach complaint to the Local Government Standards Panel.

A person may make a complaint about a serious breach (i.e. a council member committing an offence under a written law) to the Director General. The Director General then decides how the matter should be dealt with, including whether it is appropriate for the matter to be referred to the State Administrative Tribunal.

As a result, the process for lodging complaints involving alleged breaches may be viewed as complex and time consuming.

Surveys and written submissions

There was broad support for the Department being responsible for receiving all allegations of breaches of the Act. This included 84 per cent of residents, 81 per cent of staff and 69 per cent of council members. Eighty-four per cent of responses provided on behalf of a local government also supported the Department being a single place for receiving complaints about possible breaches by elected members.



Peak Bodies

The (Commonwealth) Department of Infrastructure, Regional Development and Cities supported the proposal for the Department to receive all allegations of breaches of the

Act, noting that it would negate the need for local governments to have a complaints officer.

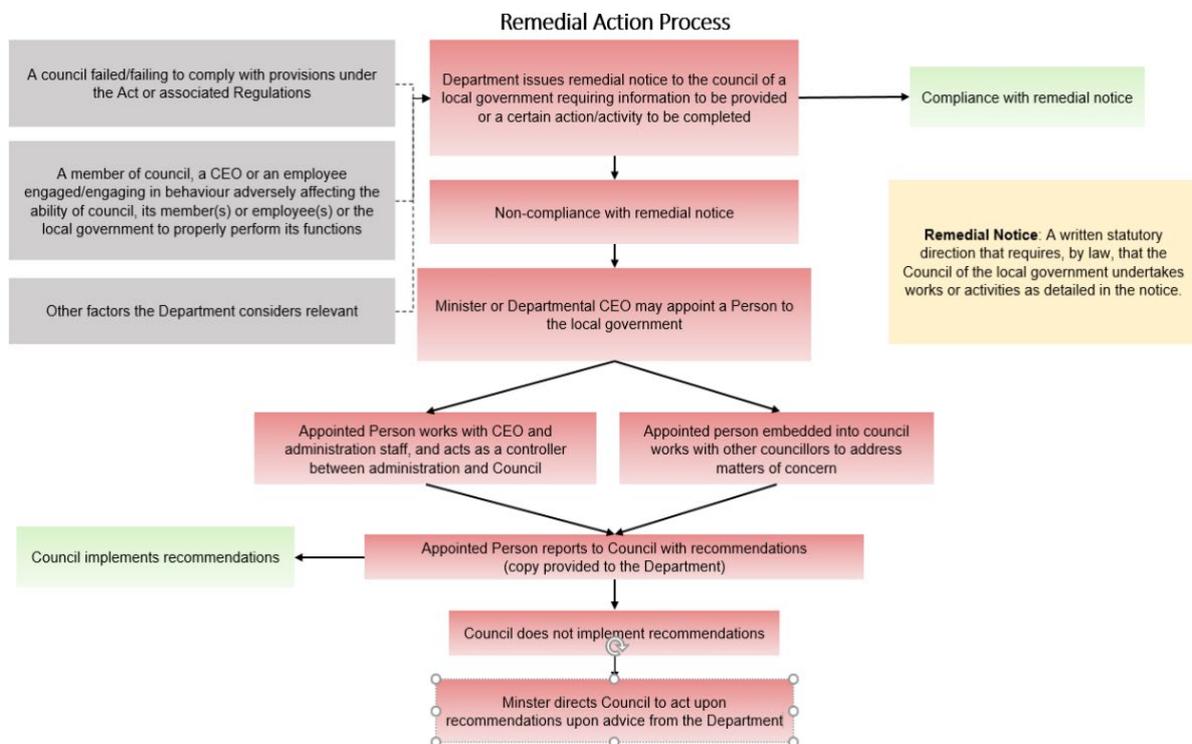
State Government's ability to assist

Remedial action process

The options available to support local governments in challenging times are currently limited and can escalate to direct interventions such as suspending a council and installing a commissioner or dismissing the council.

Feedback received through previous consultation indicated that there was support for the State Government to provide intensive assistance and support to local governments by way of a remedial action process before a situation deteriorates to the extent that suspension or dismissal is warranted.

The flowchart below outlines the proposed steps in the remedial action process.



During consultation, feedback was sought on whether the Act should provide for early intervention by way of the proposed remedial action process. This included feedback on the key elements of a proposed remedial action process, including the powers of the person appointed to the administration or council.

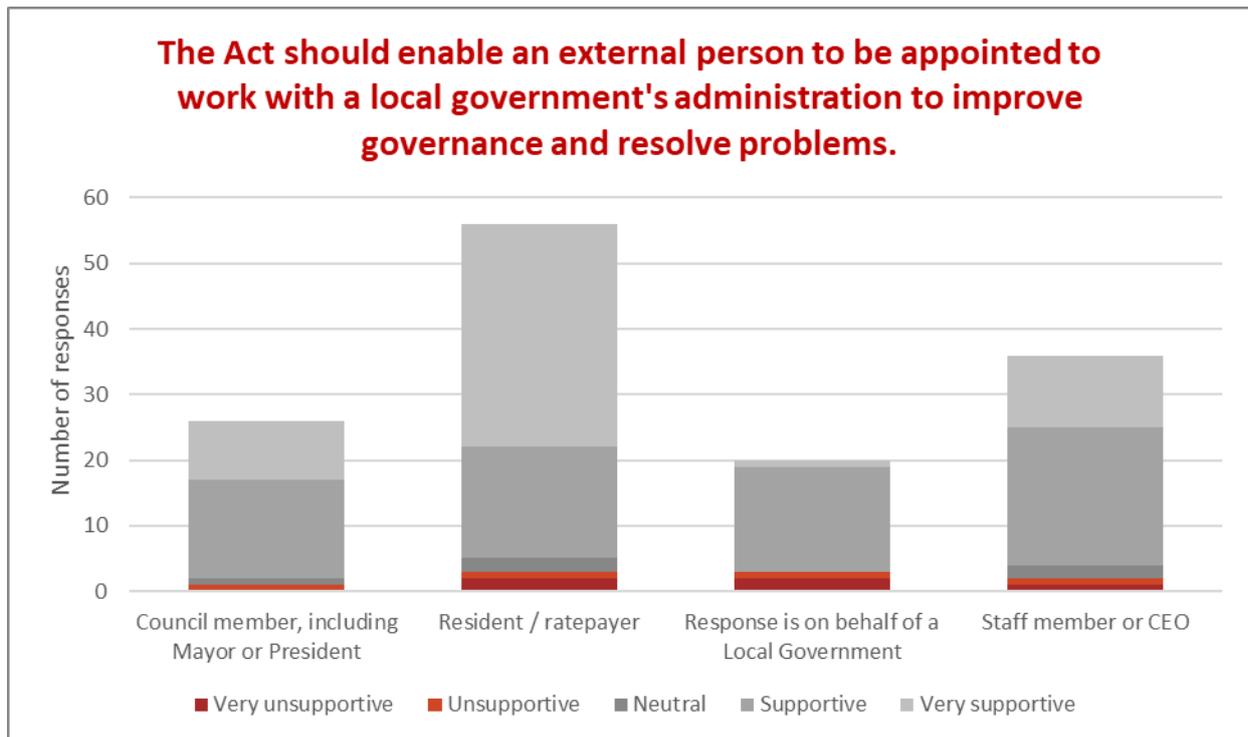
Workshops

Feedback received from workshops held with community members in Esperance, community members in Melville and staff members at the City of Stirling supported the concept of the Minister having the ability to intervene in the affairs of local governments. Other workshops did not specifically address this issue.

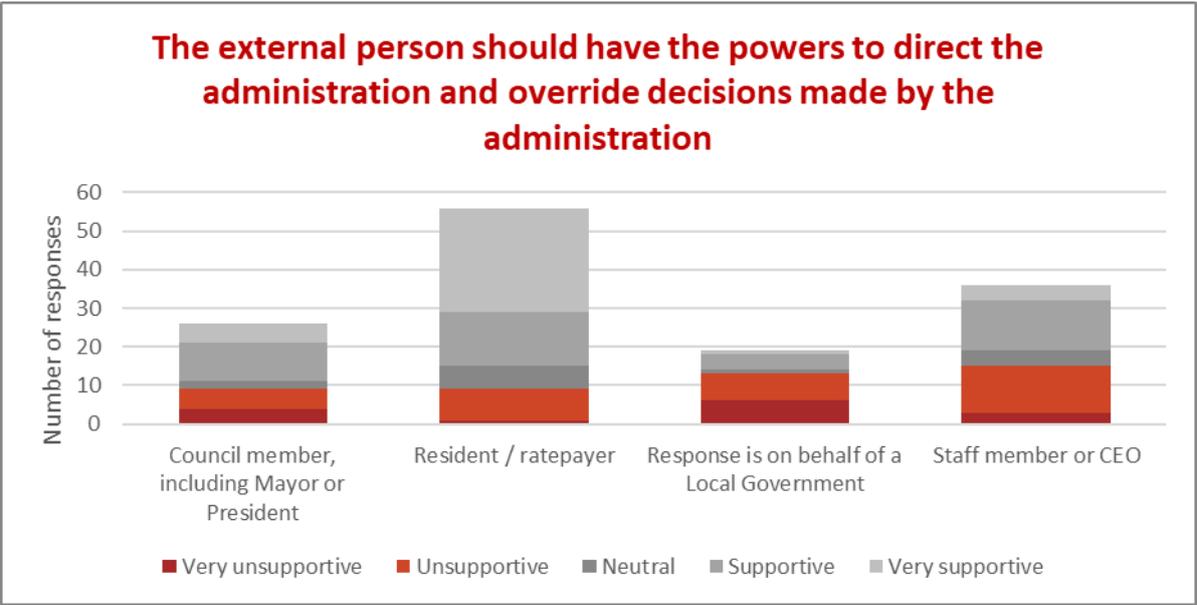
Assisting the Administration

Surveys and written submissions

The survey responses indicated overwhelming support for the Act to enable an external person to be appointed to work with a local government's administration. Overall, 90 per cent of survey responses supported this proposal: 92 per cent of council members, 91 per cent of residents, 89 per cent of staff, and 85 per cent of responses on behalf of a local government.

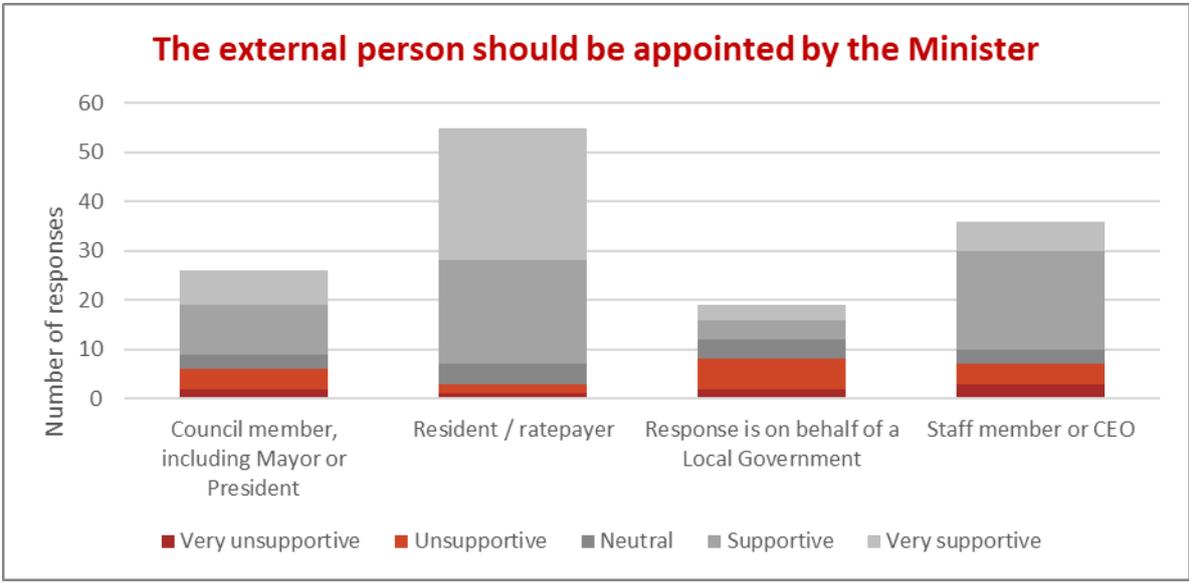


Questions then focused on the powers that such a person would have. While 57 per cent of survey respondents generally supported the external person being able to direct the administration and override decisions made by the administration, responses provided on behalf of local governments (68 per cent) did not support this concept, but there was strong support from residents (73 per cent) and to a lesser degree, by council members (58 per cent).

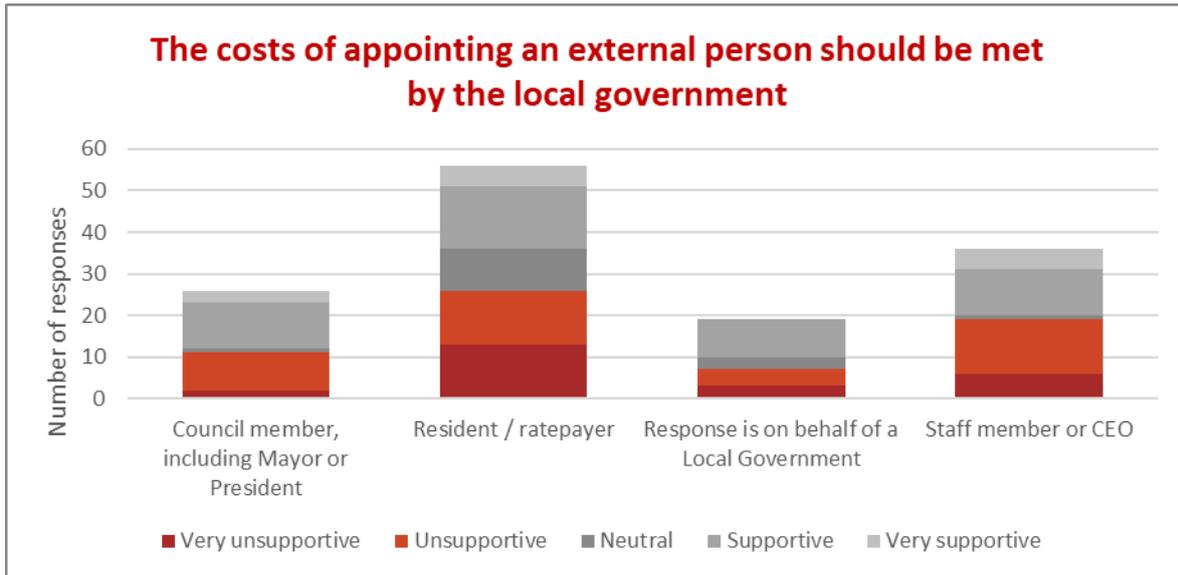


Responses from the local government sector tended to state that the powers of the appointed person should only be advisory. This includes reviewing and making recommendations on practices and procedures, mediating between parties and arranging training.

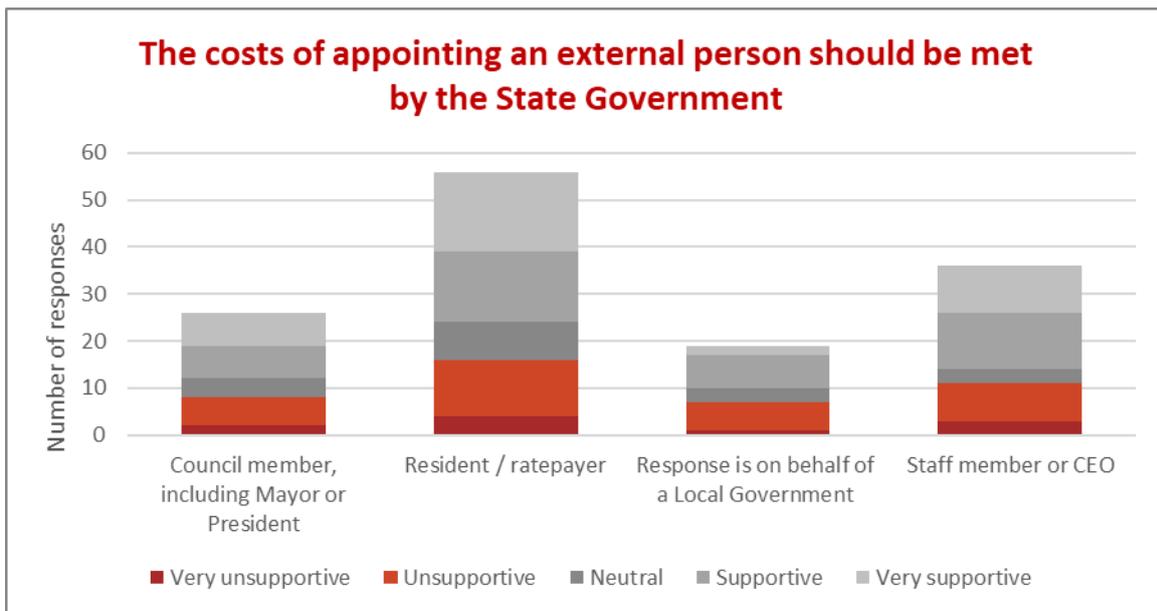
Most survey respondents (73 per cent) supported the external person being appointed by the Minister. This included residents (87 per cent), staff (72 per cent) and council members (65 per cent) and approximately one-third of the local governments that responded (37 per cent or 6 local governments).



Responses were mixed on whether the local government should pay the costs of appointing an external person to the administration. Overall, 42 per cent of respondents were supportive, 13 per cent were unsure and 45 per cent of respondents did not support this concept.



As could be expected, there was a higher level of support (56 per cent of survey responses) for the State Government meeting the costs of appointing the external person to the administration.



Peak bodies and other stakeholders

The Western Australian Local Government Association (WALGA) supported the person appointed to the administration having an advisory role:

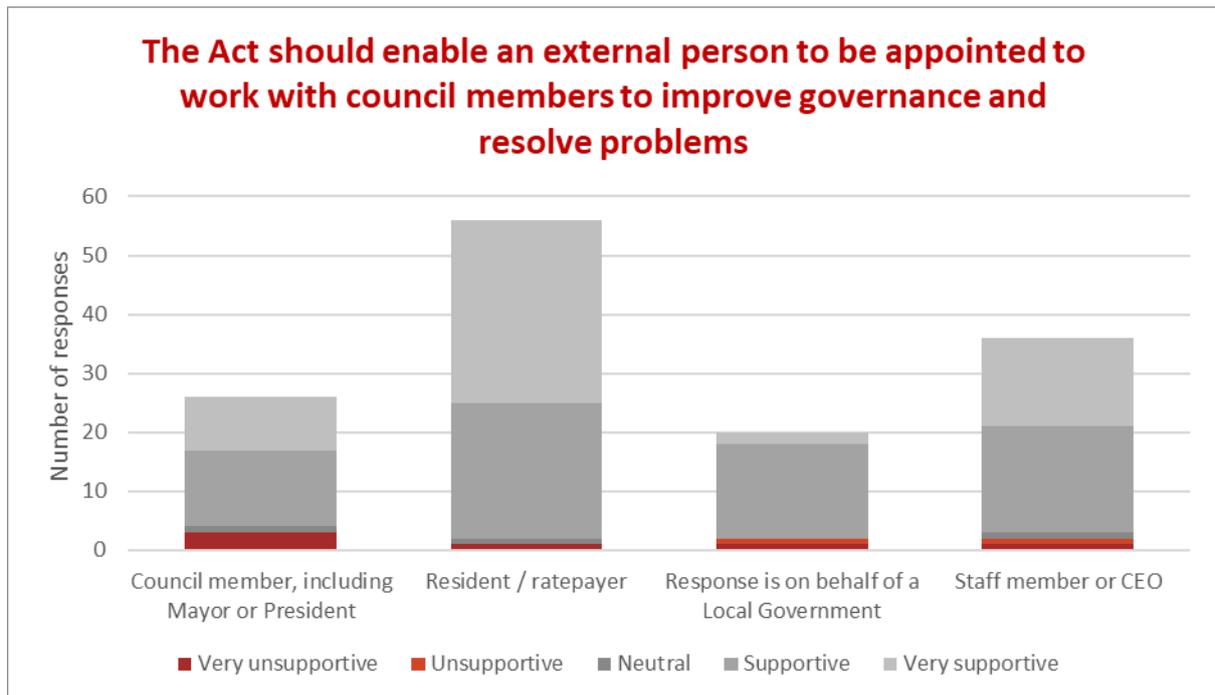
“In respect to remedial intervention, the appointed person should be a Departmental employee with the required qualifications and experience. This provides a connection back to the Department and its requirements. The appointed person should only have an advice and support role.”

Another peak body, the Chamber of Minerals and Energy of WA supported the provision of advice and governance training by the Department to address “incompetence and mismanagement”.

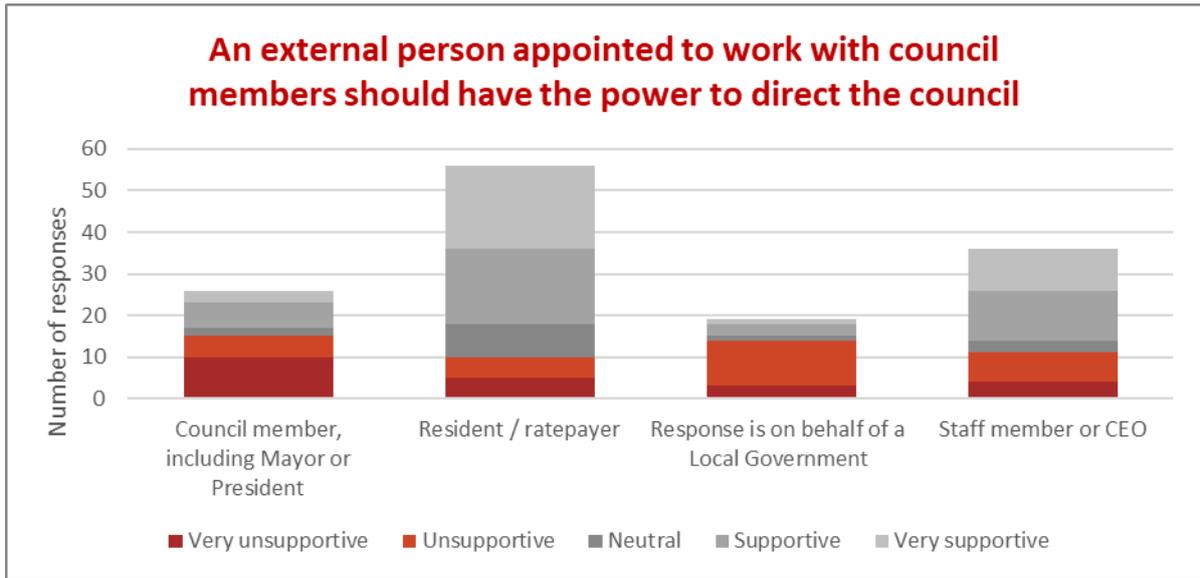
WALGA expressed its view that “funding of the remedial action should be by the Department where the intervention is mandatory. The Local Government is to pay where the assistance is requested.”

Assisting the Council

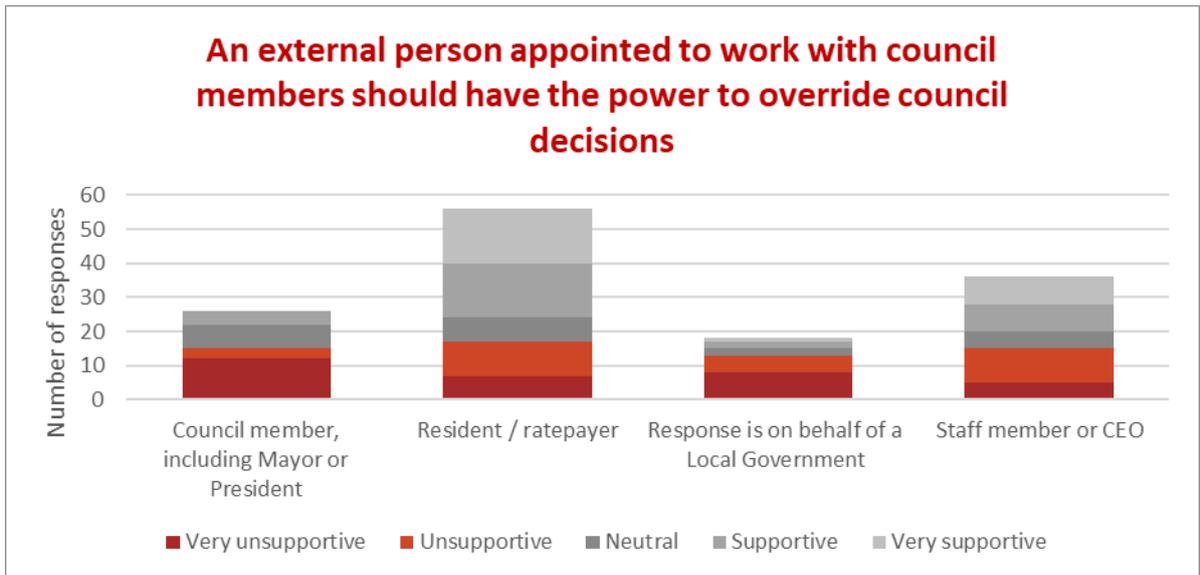
There was near universal support for the Act to enable an external person to be appointed to work with council members to address issues. Eighty-five per cent of council members, 96 per cent of residents, 92 per cent of staff and 90 per cent of responses provided on behalf of local governments supported the concept.



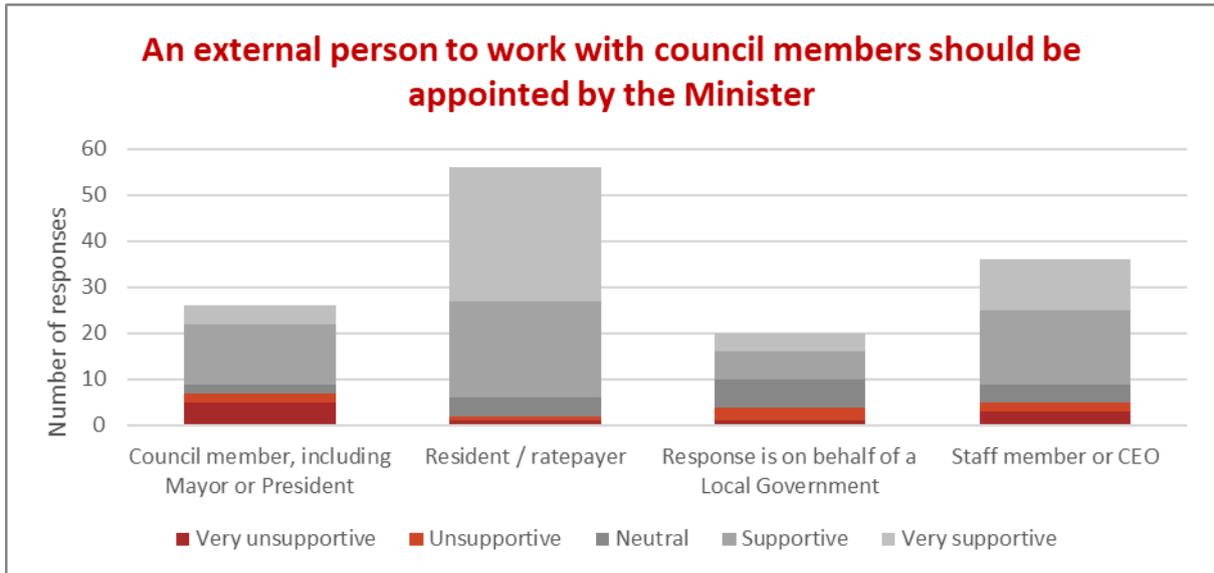
While most respondents supported the appointment of an external person to work with council members, there were differing viewpoints on the powers of that person. While two-thirds (68 per cent) of residents and 61 per cent of staff supported empowering the external person to direct council, only 35 per cent of council members and 21 per cent of responses received on behalf of local governments supported the concept.



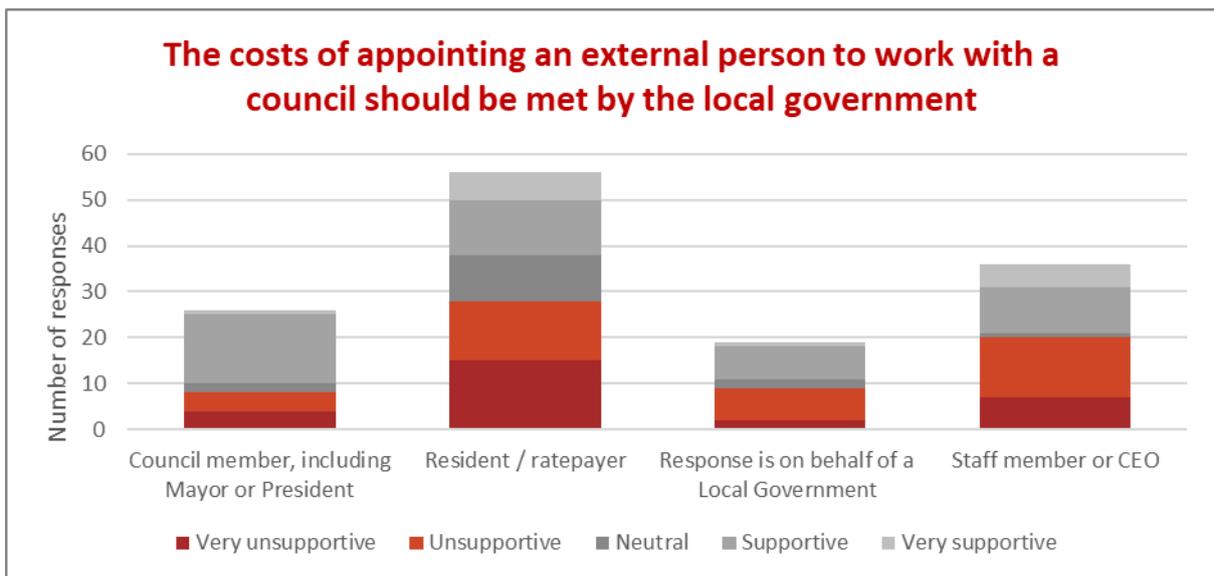
Residents who responded, generally supported powers that would enable an external person to override council decisions (57 per cent). This concept did not receive widespread support elsewhere with 42 per cent of staff, 72 per cent of responses received on behalf of local governments and 58 per cent of council members opposed to the idea.



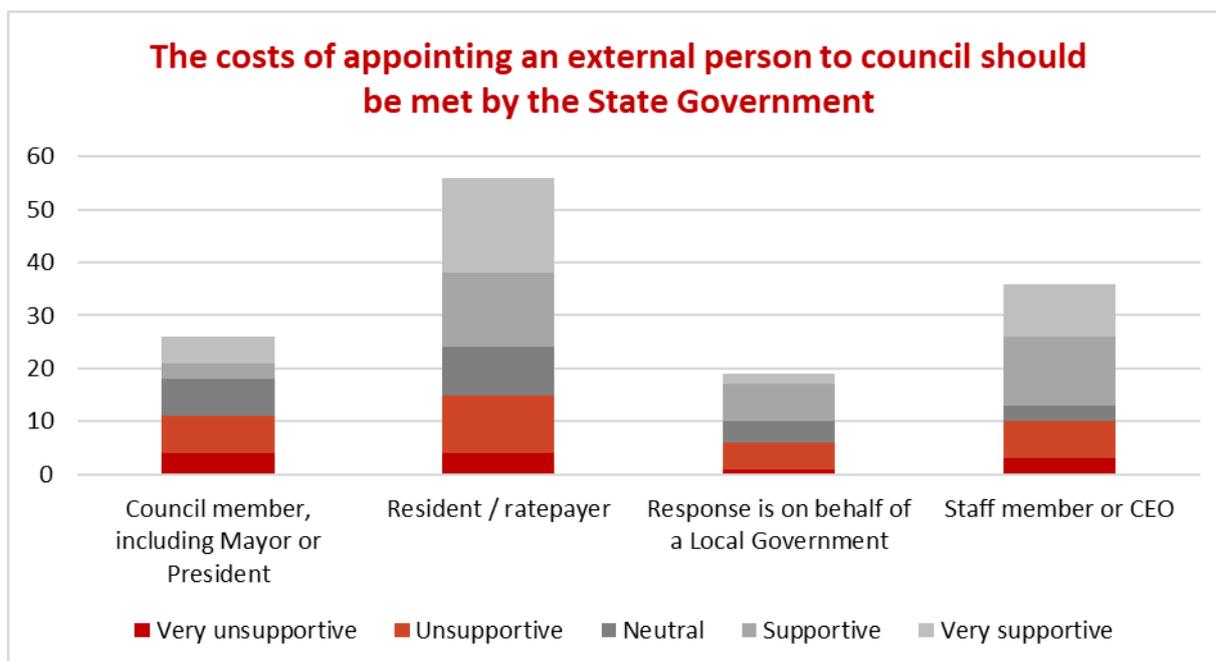
There was widespread support among residents (89 per cent), staff (75 per cent) and council members (65 per cent) for the person to be appointed by the Minister. Viewpoints were generally consistent with the responses to the question regarding an external person being appointed to work with the administration.



Most council members who responded (62 per cent) supported the costs being met by local government, with the numbers almost reversed for responding staff members (56 per cent opposed). The responses from other groups was more evenly balanced.



Views varied on whether the costs of appointing an external person to council should be met by the State Government. Fifty-seven per cent of residents and 64 per cent of staff supported this concept however, only 31 per cent of council members and 47 per cent of responses on behalf of local government were supportive.



Peak bodies and other stakeholders

The (Commonwealth) Department of Infrastructure, Regional Development and Cities expressed its support for the model of embedding an external person in council to monitor governance processes and practices, provide advice to Council on governance improvements and report to the Minister on its effectiveness. It was of the view that the external person should be appointed by the Minister and paid for by the local government.

The Property Council of WA also supported the appointment of an external person to the council to act as a “circuit-breaker” in dysfunctional, complex or contentious situations and to provide governance advice to local governments.

Civic Legal raised a concern that a person appointed to council may be appointed for political rather than compliance reasons and suggested that this should be addressed in the Act:

“If an amendment is to be made to the Act, it should contain provisions that ensure that appointments cannot be political appointments. The amendment should provide that municipal monitors be appointed on the basis of their independence as well as experience in working in or advising the sector. The amendment should specify what the powers of a municipal monitor are and what circumstances would trigger an appointment. (Civic Legal)”

Ensuring Compliance with the Act

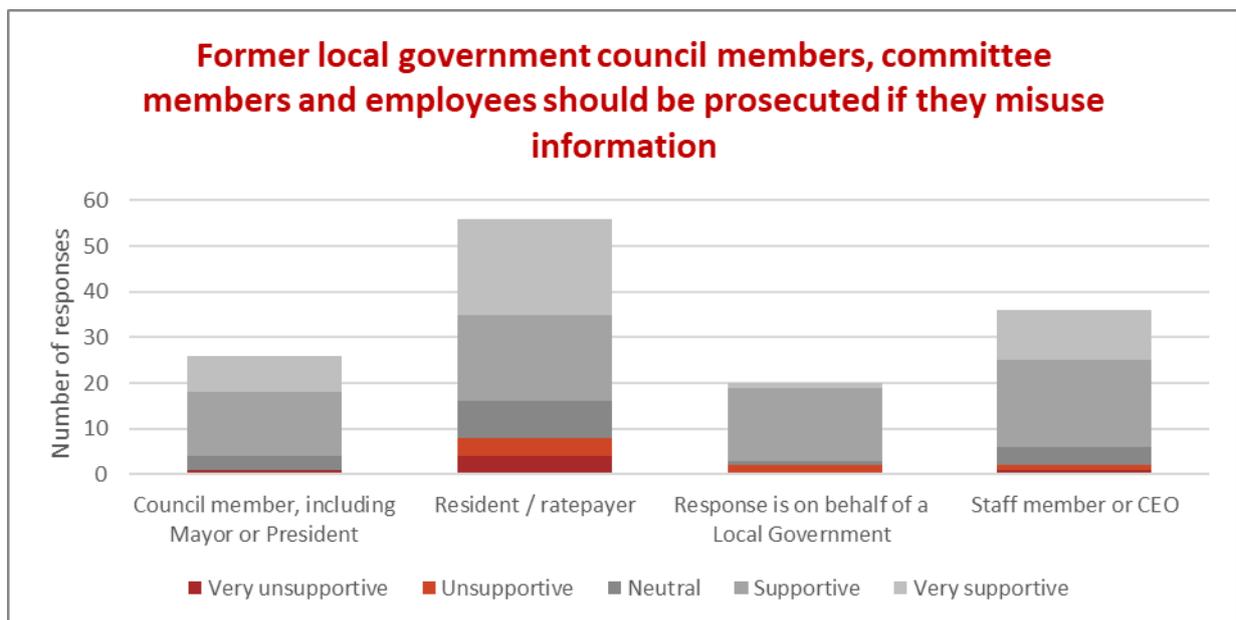
Improper use of information

Under the Act, a person who is a council member, a committee member or an employee must not make improper use of any information acquired in the performance of his or her functions to gain an advantage for themselves or any other person, or to cause detriment to the local government or any other person. This offence does not

apply to former council members, committee members or employees who use information (which they acquired when they were engaged with a local government) improperly.

Surveys and written submissions

The concept of extending the improper use of information offence to former council members, committee members or employees by providing a power to prosecute if they misuse information was largely supported (80 per cent). Responses provided on behalf of local government (85 per cent) and by council members (85 per cent) were most likely to support the concept, followed closely by staff (83 per cent). Most residents also supported the concept (71 per cent).



In opposing the concept, some local governments, including the City of Busselton and Shire of Mundaring cited perceived difficulties in enforcement. The City of Joondalup also commented:

“It also would be difficult for a local government to take action against former employees or elected members, as technically they are no longer in the services of the local government, and therefore could not use their position improperly... If such provisions are enshrined in legislation it is unclear who or what agency would pursue such an offence through the courts, and it is unlikely that the respective local government, or the Department itself, would have such capacity to do so.” (City of Joondalup)

Peak bodies and other stakeholders

The Property Council of WA expressed its support for the extension of the ‘improper use of information’ offence to former council and committee members, and to council staff.

New offence – Improper use of position

Under the *Local Government (Rules of Conduct) Regulations 2007*, a council member must not make improper use of his or her office as a council member to gain directly or indirectly an advantage for themselves or any other person, or to cause detriment to the local government or any other person.

As this regulation only applies to elected members, there is no equivalent “improper use of position” offence under the Act which applies to Chief Executive Officers or employees of a local government.

An amendment to the Act could be made to include an “improper use of position” offence which applies to council members, Chief Executive Officers and employees of a local government, and to former council members, Chief Executive Officers and employees. This would ensure that Chief Executive Officers and employees do not escape liability for improperly using their position, especially in situations where the conduct of the individual does not fall within the jurisdiction of the Corruption and Crime Commission or the Public Sector Commission.

Surveys and written submissions

Most local government staff (89 per cent), residents (80 per cent) and council members (81 per cent) strongly supported powers to prosecute council members, committee members or staff that use their position to cause detriment to a local government or person. Responses received on behalf of local governments also tended to support the concept (68 per cent) but not to the extent of other groups.



In addition to perceived issues with enforcement, some respondents did not support the concept because such rules did not apply to State Parliamentarians.

Other submissions raised concerns that council members, staff and members of the public were not afforded sufficient protection as whistle-blowers or dissenting voices and that offences designed to limit instances of causing detriment would be applied to people speaking in the interest of the community:

“If they are simply whistle-blowers alerting the public to misconduct by council/the executive they should not be prosecuted. There needs to be protection for councillors who are seeking to reveal information that is in the public interest in a bid to push for better governance... Those doing wrong and abusing their position of power in local government who want to keep the ‘status quo’ will push the line [with] any criticism levelled at the shire by residents [as] ‘detrimental to the local government’ and any councillor who supports (potentially valid) criticism and questions the local government needs to be able to do so without fear of legal reprisal. We need to safeguard our democratic right to question, challenge and criticise what needs to be improved.” (Resident, City of Swan)

“The legislation would make it impossible for such a person to draw attention to the misdeeds without "using their position to cause detriment to the local government or any person" (Resident, City of Subiaco).

New offence – providing false or misleading information to council

In making decisions, the council of a local government may consider written reports which have been prepared by the Chief Executive Officer or employees of the local government and verbal information provided by local government staff (normally senior executive staff) during a council meeting. There is currently no provision under the Act which makes it an offence for a Chief Executive Officer or employee to provide false or misleading information to council.

The Act could be amended to provide that the Chief Executive Officer or an employee of a local government must not deliberately or negligently provide false or misleading information to council. This would ensure that a council, as the decision-making body of a local government, is provided with accurate information from its Chief Executive Officer and employees.

Surveys and written submissions

Council members (96 per cent) almost universally supported powers to prosecute people who knowingly provide false or misleading information to council. Significant support was also received from residents (87 per cent) and staff (86 per cent). Responses provided on behalf of the local government as a whole were the least likely to support the concept (60 per cent).



“The term 'false or misleading' must be carefully defined such that it does not apply to expressions of professional opinion with which someone disagrees. Falsity must be objectively demonstrable, and consideration given to knowledge and intent.” (Staff member, City of Melville)

Peak bodies

The Property Council of WA commented that it “supports the introduction of the ‘false or misleading information’ offence to local government as exists for State Parliament”.

New offence – Tendering requirements

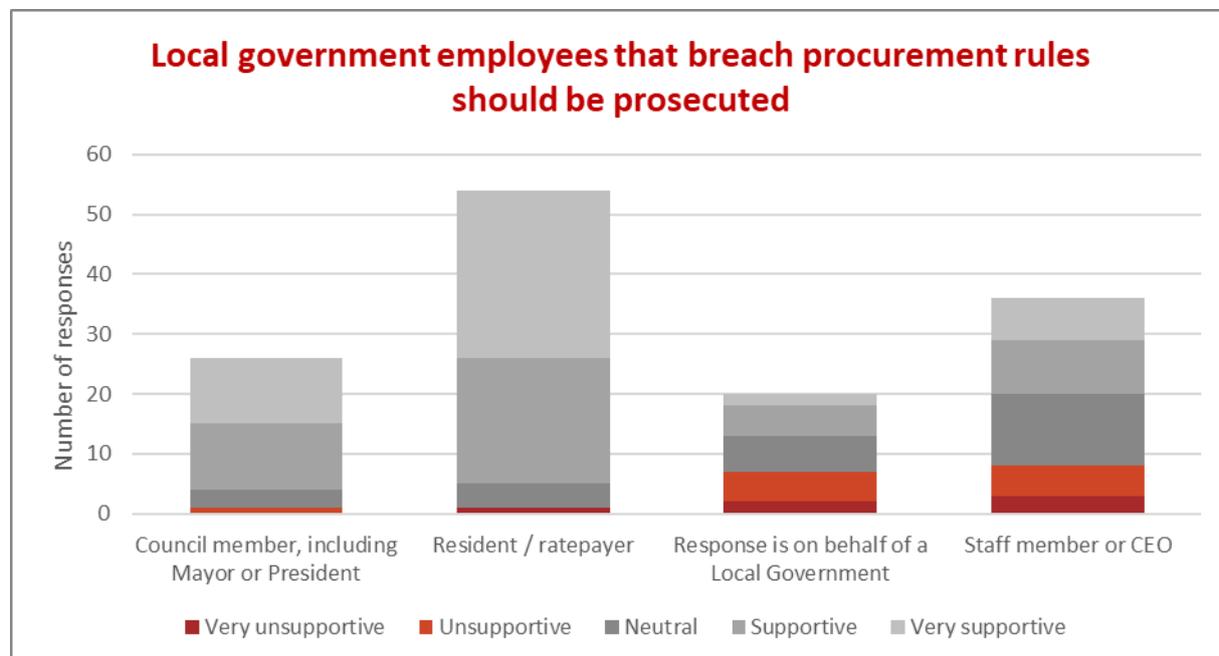
The Act requires a local government to invite tenders before it enters into certain contracts for the supply of goods or services. The *Local Government (Functions and General) Regulations 1996* set out the requirements regarding when tenders must be publicly invited and how the tendering process is to be undertaken.

Currently, the Act does not provide that a breach of the tendering provisions under the Act and regulations is an offence. Therefore, a person who does not comply with the tendering requirements cannot be prosecuted unless their conduct constitutes an offence under another provision.

To ensure that these requirements and obligations are enforced, the Act could be amended to provide that the non-compliance of tendering requirements is an offence.

Surveys and written submissions

Ninety-one per cent of residents and 85 per cent of council members supported powers to prosecute local government employees who breach procurement rules. Forty-four per cent of local government staff and 35 per cent of responses provided on behalf of local governments supported the concept.



Civic Legal did not support criminalising breaches of the tendering regulations. Reasons supporting their position included the potential increase in administrative costs for local governments and that breaches as a result of prioritising efficiency over compliance were not sufficient justification to allow prosecution of these breaches:

“Criminalising breaches of administrative procedures will cause CEOs and other officers of local governments to seek legal advice on procurement processes routinely. This would be for the purpose of self-protection as well as for compliance. This will increase the administrative burden and cost to the local government of procurement processes.”

“...CEO breaches of tendering regulations that we are aware of appear to be the result of misguided attempts to be efficient or dynamic or else compliant with priorities placed upon them by their councils. We are aware of some recent cases of breaches of the tendering regulations, including the high-profile cases of the Shire of Halls Creek and the Shire of Exmouth. In those two cases, the errant CEOs appear to have been motivated to breach the tendering regulations in order to cause their local governments to act expeditiously. There appears to be no evidence that they acted with the dishonest intention of enriching themselves or a third party.

Accordingly, the mischief that was common to the two cases is arguably that of having CEOs and other officers prioritising efficiency over compliance with the regulations. That is hardly a basis for criminalising such breaches.” (Civic Legal).

Enforcement of the Act

Infringements

Infringements allow breaches of legislation to be resolved by way of a fixed penalty and can be an effective way of deterring people from further non-compliance.

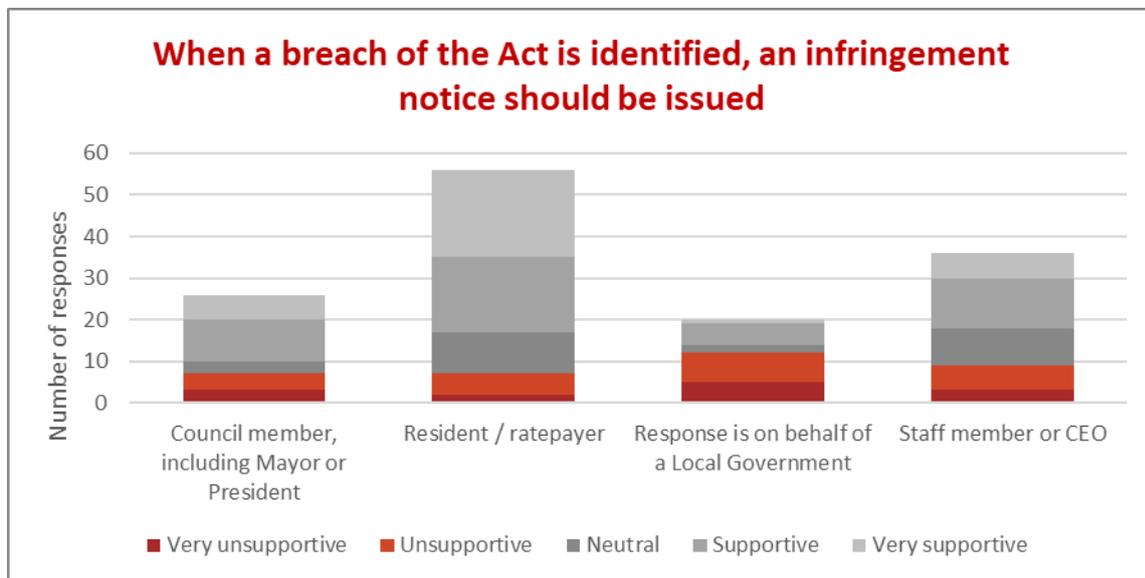
The Department can commence a prosecution against local governments and individuals for offences under the Act but may be reluctant to do so due to the costs involved in legal proceedings. It may not be in the public interest to spend funds on prosecuting for offences where the impact has been small.

While not all offences are suitable to be dealt with via an infringement notice, it may be appropriate for some offences to be infringeable. Examples include:

- Failure to invite tenders before entering into a contract;
- Failure to vote during a council or committee meeting;
- Failure to lodge a primary return by the required date; and
- Failure to lodge an annual return by the required date.

Surveys and written submissions

There was some support for the issuing of infringement notices when breaches of the Act occur. Residents (70 per cent) were most likely to support the concept followed by council members (62 per cent) and staff (50 per cent). Less than one-third (30 per cent) of responses provided on behalf of local government supported the concept.



At least one response indicated that they did not support the introduction of fines for breaches of the Act because small local governments were unable to comply with the current requirements:

“It is difficult and onerous for smaller local governments to comply with all procurement rules and/or not be aware of all legislation regarding knowledge/information etc. Prosecutions and fining of smaller local governments/employees/councillors for minor breaches would be counterproductive.” (Confidential response)

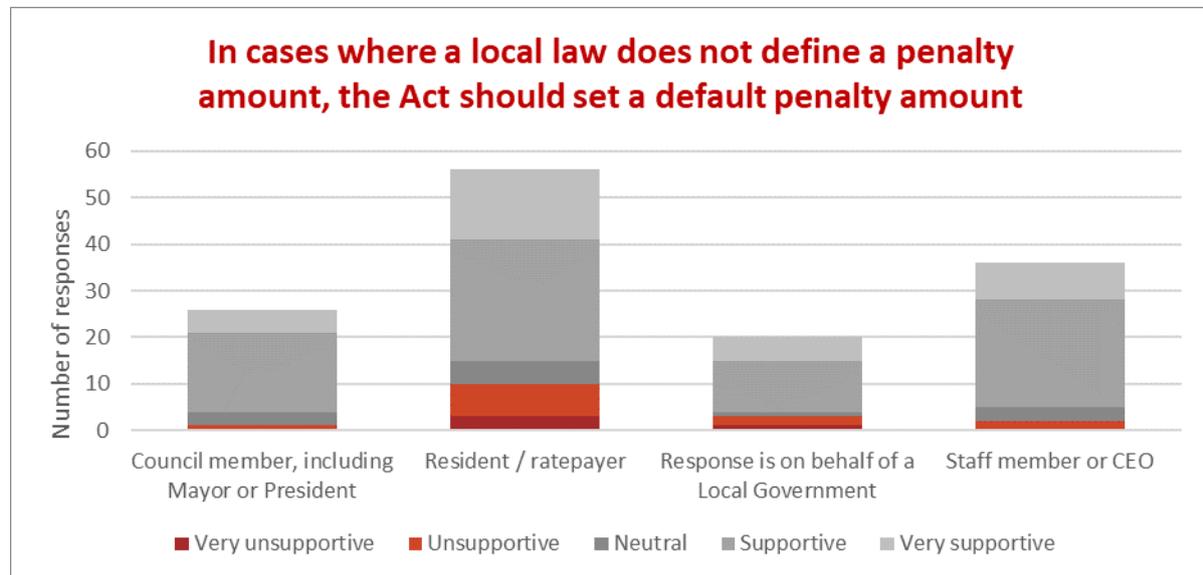
Default penalties for local laws

The Act allows local governments to make local laws and there are various pieces of legislation that enable local governments to set penalties for offences in their local laws. If a local government fails to provide a penalty for an offence contained within a local law, the local government is unable to enforce that offence.

To ensure that any local laws which do not specify penalties for offences are enforceable, the Act could be amended to include a provision for a default penalty to apply.

Surveys and written submissions

There was broad support among respondents for the Act to set a default penalty amount for local laws in cases where the local law did not define the penalty amount. Council members (85 per cent), residents (73 per cent), local governments (80 per cent) and staff (86 per cent) supported the concept.



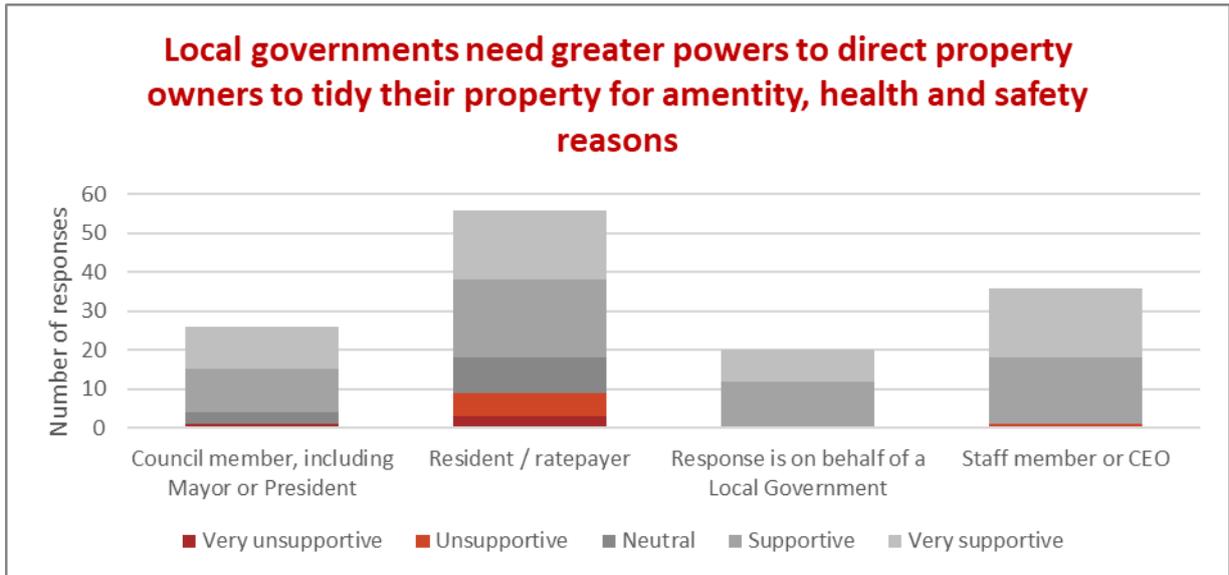
Powers under the Act

Notice to secure a building

Vacant buildings can be vandalised and used for inappropriate purposes by squatters. Although local governments have broad powers with respect to issuing notices to remediate issues on premises, they do not have the ability to request that an owner must effectively secure a building. The Act could be amended to include an ability for a local government to provide a notice which requires the owner to secure a building.

Surveys and written submissions

There was universal support for greater powers to direct property owners to tidy their property for amenity, health and safety reasons in responses provided on behalf of local government (100 per cent) and near universal support from local government staff (97 per cent). Support also existed from council members (85 per cent) and to a lesser extent from residents (68 per cent).



In respect of powers to direct property owners to clean their property for health and safety reasons (for example in cyclone prone areas), differing opinions were offered. Some were very supportive:

“This is incredibly important. Local governments need greater powers to direct property owners to tidy their property for amenity, health and safety reasons.”
(Council member, City of Greater Geraldton)

Others were concerned that such powers could be abused by local government:

“There would need to be very tight guidelines around providing a local government greater powers over residents property, rubbish removal. Without a strong framework there is opportunity for 'power' struggles particularly in regional towns.” (Resident, Shire of Toodyay).

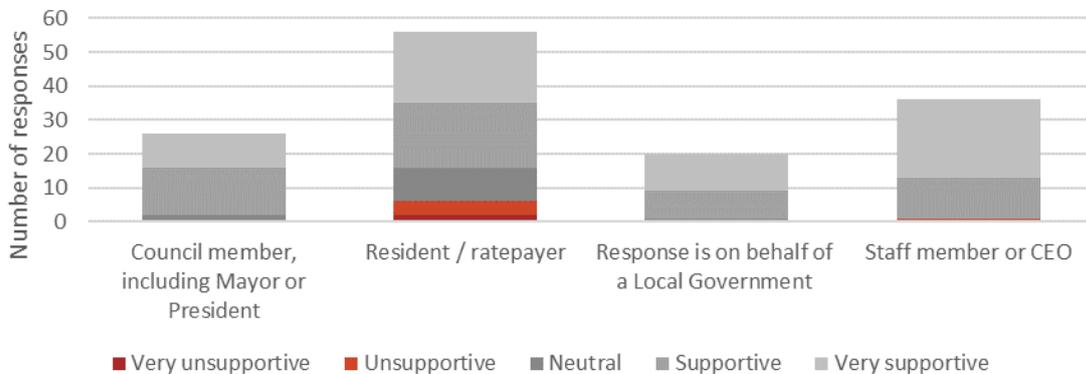
Expanding the list of disused materials

Currently, the Act defines “disused materials” to include disused motor vehicles, old motor vehicle bodies and old machinery. This list of disused materials could be expanded to enable a local government to direct a person to remove items other than vehicles and machinery from land that it considers to be untidy or causing a hazard.

Surveys and written submissions

Responses to the question of whether greater powers to direct property owners and occupiers to remove items like disused motor vehicles for amenity, health and safety reasons largely mirrored those for the previous question. Most respondents supported the concept, namely 92 per cent of council members, 97 per cent of staff, 95 per cent of responses on behalf of local government and 71 per cent of residents.

Local governments need greater powers to direct property owners and occupiers to remove items like disused motor vehicles for amenity, health and safety reasons



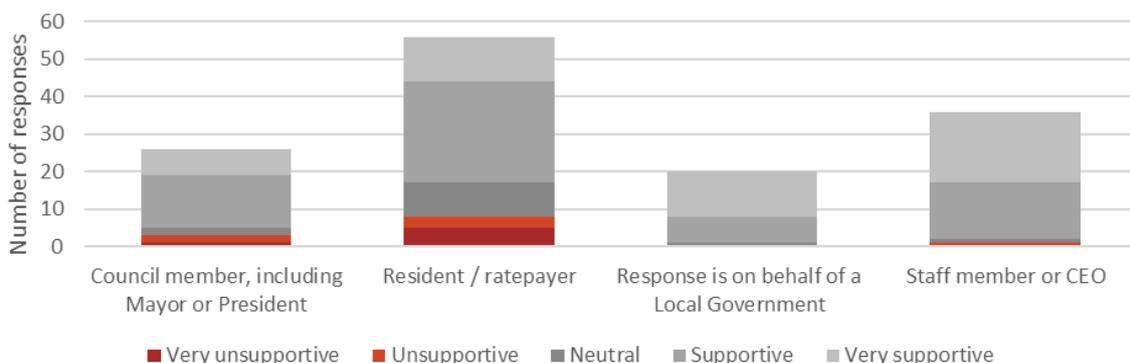
Framework for disposing of property

The procedure in the Act for disposing of property removed by a local government due to a contravention of a local law or regulation is unclear. The Act could be amended to provide a clearer framework for local governments to dispose of property. This would include the type of property that may be disposed, when property is to be disposed and how property is to be disposed.

Surveys and written submissions

Responses from staff (94 per cent) and received on behalf of local government (95 per cent) supported the ability for local governments to destroy property or items removed from a property within 28 days when there has been a breach of a local law or regulations. This might include rubbish, goods deemed to be of little value, or decaying items. This concept was also supported by most council members (81 per cent) and residents (70 per cent).

Local governments should be able to destroy property or items removed from a property within 28 days when there has been a breach of a local law or regulations



Summary

An analysis of feedback received through the consultation workshops and submissions has identified the following key themes:

- There is support for the complaints process to be simplified so that the Department is responsible for receiving all complaints about alleged minor breaches and serious breaches under the Act.
- There is support for changes to enable the appointment of an external person to work with the administration or council to improve governance and resolve issues.
- There are mixed views in relation to the powers of the appointed person, namely, whether they should have the power to direct and override the decisions of the administration or council, or whether their role should be advisory only.
- There may be an opportunity for:
 - extending the improper use of information offence under the Act to apply to former council members, committee members or employees;
 - introducing new offences in relation to knowingly providing false or misleading information to a council and breaching tender requirements;
 - dealing with some breaches of the Act by way of infringement notices;
 - providing default penalties for local laws;
 - broadening the powers of local governments to deal with securing and tidying-up property and the removal of disused materials; and
 - clarifying the framework for local governments to dispose of property.

Where to from here

Feedback and suggestions received during the consultation period will be used to inform the new Local Government Act.

Consideration will be given to expanding the ability to intervene to support local governments in a variety of ways.