



CIVIC LEGAL

# ***Local Government Act 1995 Review***

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## **Civic Legal Submission**

**9 February 2018**

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# 1. Relationships between council and administration

## Defining the roles of council and administration: Guidance questions

- 1) How should a council's role be defined? What should the definition include?
- 2) How should the role of the CEO and administration be defined?
- 3) What other comments would you like to make on the roles of council and administration?
- 4) Are there any areas where the separation of powers is particularly unclear? How do you propose that these are improved?

### Role definition not an issue

The roles of council and administration should remain defined as currently appears in the *Local Government Act 1995* ("the Act"). The Consultation Paper has not identified any evidence that changes are required.

Both the problems of a lack of understanding or deliberate attempts to act outside the separation of powers are symptomatic of a lack of training, rather than a lack of legislative detail. The Consultation Paper does not identify any cases decided by the courts where judges have commented on the lack of clarity of role in the Act.

### More legislation does not equate to better legislation

If the legislation were to become more prescriptive, then one unintended consequence might be an increased emphasis on compliance rather than strategy by councils.

Further, greater detail in legislation tends to generate more opportunity for debates over legislative interpretation.

### Do the Eastern states models add anything?

None of the additional provisions contained in the legislation the Eastern states of Australia (described on page 19 of the Consultation Paper) would add anything substantive to promoting a greater understanding of the roles in question.

## Improving relationships between council and administration: Guidance question

5) Do you have any other suggestions or comments on this topic?

### **Legislating to improve relationships – a noble but misguided challenge?**

The question of how to improve relationships between council and administration concerns the skills required to manage interpersonal relationships as well as an understanding of the different roles of the parties. Legislating for such things is fraught with difficulty and not recommended. It would also be impractical to legislate for positive relationships between the council and the administration.

Change and renewal is always challenging in organisations. Local governments are no different in finding these things challenging. One difference between local governments and the private sector is that elections force regular change in local government and that is one of the ways to ensure a healthy democratic culture in the community.

The strength of the relationship between a council and their CEO depends to a large extent on the quality of trust and confidence that underpins that relationship. Any legislative change intended to improve the climate of that relationship should focus on the removal of impediments to the creation and maintenance of such trust and confidence.

### **CEO's corruption notification role erodes trust**

One area that should therefore be seriously considered for reform in this context would be with respect to section 28 of the *Corruption Crime and Misconduct Act 2003* ("the CCM Act").

Section 28 requires the "principal officer of a notifying authority" to notify the Corruption and Crime Commission of any matter which that person "suspects on reasonable grounds concerns or may concern serious misconduct".

The intention of parliament is commendable in seeking to remove corruption through placing obligations on key persons in organisations like local governments. However, the CEO's obligation to report corruption in this manner is a corrosive element in the climate of trust and confidence that should reside in the relationship between a CEO and his or her council.

Section 28 turns the CEO into a state government agent under a duty to police serious misconduct amongst the very councillors who employ him or her. On the other hand, the CEO is also under a duty to be a loyal and trusted employee of the council, guiding it, advising it and executing its decisions.

The interaction of these two roles places the CEO in a conflict between two duties.

Perhaps the obligation under the CCM Act should reside in some other person within the administration. At least in this way, the policing function under section 28 is removed to a person who does not have the most direct relationship with the council.

## 2. Training

### Mandatory training: Guidance questions

- 10) Should elected member training be mandatory? Why or why not?
- 11) Should candidates be required to undertake some preliminary training to better understand the role of an elected member?
- 12) Should prior learning or service be recognised in place of completing training for elected members? If yes, how would this work?
- 13) What period should apply for elected members to complete essential training after their election?

### Continuing professional development: Guidance questions

- 14) Should ongoing professional development be undertaken by elected members?
- 15) If so, what form should this take?

### Training: Guidance question

- 16) Do you have any other suggestions or comments on training?

#### A suggested approach

The list of competencies in section 2.1 of the Consultation Paper seems to be a reasonable one. The idea of compulsory training is also reasonable.

One consideration might be to link the concept of training more strongly to incentives and outcomes, rather than compliance.

More training does not necessarily mean better training.

Further, it will achieve more productive outcomes when trainees undertake training to achieve measurable results for their local government, rather than simply to ensure they comply with the relevant regulations.

Rather than legislate minimum requirements (such as a number of hours of training per annum) for elected members, consideration should be given to granting dispensations to the local government whose elected members have undergone certain levels of training in the year.

Under such an approach, the Department would give dispensations or grants to councils measured against the number of hours of training collectively done by a local government's elected members in a year.

This might take the form of reduced scope of audits, discounts on insurance premiums, rebates of membership fees of the WA Local Government Association, increased grant funding in selected categories, etc.

These would all act as incentives to councils to undertake training so as to achieve reduced costs, better performance, additional funding etc.

Every council is composed of elected members with differing levels of academic ability, time constraints, aptitude etc. Setting minimum levels of training for the council as a group will take account of the fact that the constituent elected members have differing capabilities and availability. Further, that can generate a team culture amongst the elected members in the same council.

In order to retain some flexibility in the matter, such an approach should not be legislated. Rather, it should be instituted either through regulations or protocols agreed with the Department.

One additional benefit to this approach would be that the community could assess their council by reference to how much effort they have put into seeking greater levels of training. Members of the community could commend their local government for achieving a certain level of grant funding or a reduction of audit scopes (and therefore costs) or criticise them if they have not.

## **Funding**

The Consultation Paper refers to elected member training that was funded by the Country Local Government Fund in the amount of \$1.5 million over the period 2014 to 2017.

This funding was, however, not available to the entire pool of potential providers of training. Therefore, local governments did not have as wide a choice as they could have.

Serious consideration should be given to making such funding available in future to as wide a range of providers of possible. Each local government should have the discretion to nominate their providers, whose costs would be defrayed by such funding.

The wider the choice to local governments, the more open the field, the more likely it will be that quality providers will come to the forefront. Motivated providers and motivated elected members are more likely to combine into a healthy environment of skills acquisition amongst local governments.

### 3. The behaviour of elected members

#### Codes of conduct: Guidance questions

- 17) Should standards of conduct/behaviour differ between local governments?  
Please explain.
- 18) Which option do you prefer for codes of conduct and why?
- 19) How should a code of conduct be enforced?

#### Standards not to differ

Standards of conduct/behaviour should not differ between local governments. All elected members are required to observe the legal duties to act reasonably, fairly and in good faith, and to exercise their powers for the purpose for which they were given. As there is one standard set of legal duties, so should there be one standard of conduct.

#### Systemic problem?

At the moment, codes of conduct are enforced by the CEO. This puts the CEO in an invidious position as he or she is the only employee of the council. Even if the CEO finds that there are grounds to take disciplinary action under a code of conduct, it will tend to damage the relationship between the CEO and the councillor. The offending councillor becomes disaffected and can become hostile to the CEO. This can lead to bias expressed in performance reviews that will tend to be more adverse than should be the case.

#### A possible solution

One possible solution to this current conundrum faced by the CEO would be the removal of this responsibility to another person. That person should be someone who is neither employed by the local government nor an elected member in it. The adjudicating person or persons could be drawn from third parties who have knowledge or experience in local government matters or regulations, such as former local government CEOs, law firms that have lawyers experienced in advising local governments on governance matters, professional mediators or retired politicians. The fees, travel and other costs of the third party would be paid for by the local government.

The third party should not be an elected member of another council. The reason is that the culture of the other local government could be different from the subject local government. Further, having a councillor from another local government sit in



judgment over the subject local government could be a basis for actual or perceived inter-governmental tensions.

### Revised disciplinary framework: Guidance questions

- 23) Do you support an outcome-based framework for elected members? Why or why not?
- 24) What specific behaviours should an outcomes based framework target?

### Outcome-based approach supported in principle

We consider that an outcome-based disciplinary framework has some attraction. However, we do not consider that the outcome-based model described in Option 2 should be adopted. There is also some merit in the model described in Option 1 but that has the potential to not be as effective as it could be.

Option 1 has the advantage of removing the burden of minor complaints from the Standards Panel to the local government to manage. If that cures the main problem with the current system, then that would already be a useful reform.

Option 2 has the disadvantage of uncertainty. It will be hard to avoid vagueness when preparing a complaint against an allegedly errant councillor. It would be necessary to undertake a great deal of preparatory work to be able to form an opinion that respondent councillor has acted in such a way as to “impair” the integrity, operations or reputation of a local government.

Furthermore, the lack of clarity of such a system would make it difficult for councillors to know what the boundaries are and leave them having to guess whether their conduct will run afoul of the system. They would not know how to calibrate their conduct in order to avoid running afoul of a subjective view as to whether the conduct was or was not “impairing” the local government. It would have an inhibiting effect on the freedoms of speech and action that are accepted democratic rights in Australia.

If a complaint were to be levelled against a councillor under Option 2, he or she would have to undertake a great deal of their own investigative work and research in order to be able to respond with the defence that they did not impair the integrity, operations or reputation of the local government. In effect, placing this sort of burden on a respondent amounts to an erosion of the well-established legal requirement to grant natural justice to an accused party.

The burdens and uncertainties inherent in Option 2 make for an unwieldy and disproportionately costly system. Further, its erosion of natural justice, inhibiting effects and uncertainties are all reasons to reject it.

### **An alternative suggestion**

One alternative would be to streamline the system in the way suggested in Option 1 but then also introduce a range of penalties that will enable the tribunal to penalise a guilty councillor according to the extent of impairment that the conduct in question has caused.

In this way, a prosecuting authority would only need to undertake the substantial work of proving the extent of impairment in a reduced number of instances, namely in those cases where a councillor has been found guilty, rather than in all cases.

### **Application of the Rules of Conduct: Guidance question**

25. Should the rules of conduct that governed behaviour of elected members be extended to all candidates in council elections? Please explain.

No. The rules are intended to govern the behaviour of public officers, namely the elected members of local governments. Candidates for election to local government office are not public officers. The laws that govern public officers are intended to ensure fair and impartial public administration. That is because public officers have the power to affect the rights of people in the community.

On the other hand, candidates in elections do not have such power and therefore it is not necessary for the laws and regulations that constrain the conduct of those in power to constrain those candidates. To do so would be analogous to imposing the professional conduct rules of the Legal Profession Act on law graduates seeking to become qualified as lawyers. The rules should apply to elected members who are expected to know the rules of conduct, and not to candidates who are seeking entry into that position.

### **Offence Provisions: Guidance questions**

- 26) Should the offence covering improper use of information be extended to former members of council for a period of twelve months? Why?
- 27) Should this restriction apply to former employees? Please explain.

## **Extension supported**

The offence of using improper information should be extended to former members of council, whether for 12 months or some other period.

Such an extension would recognise the fact that any prejudice that may result from the improper use of information can be felt well after a councillor has left office.

Further, if administrative obstacles delay the detection and prosecution of a councillor, it would seem to make a mockery of the system if a councillor could take advantage of such a restriction and act improperly without sanction. There seems to be no good reason why an offender should be excused from the offence of improper use of information simply because they have left public office.

For the same reason, such a restriction should also apply to former employees.

## **Confidentiality: Guidance question**

28) Is it appropriate to require the existence and details of a complaint to remain confidential until the matter is resolved? Why?

There seems no good reason for extending a protection that exists for a particular type of mischief during a particular timeframe (the election period) to become one that exists at all times.

It would be consistent with the values of a modern democratic civil society to change the rule so that it no longer prohibits disclosing the lodgement of a complaint during the election period, but instead prohibits the lodgement of any complaints during the election period.

In this way a complainant can lodge a complaint at any time except during the election period. This would remove from the system the anomaly that one's freedom of speech appears to be curtailed at the very time when freedom of speech is being given expression through an election period.

## **Review of elected member non-compliance: Guidance questions**

36) Which of the options for dealing with complaints do you prefer? Why?

37) Are there any other options that could be considered?

- 38) Who should be able to request a review of a decision: the person the subject of the complaint, the complainant or both?

### **Systemic problem or under-resourcing the issue?**

It is our view that Option 2 gives few, if any advantages over the *status quo* in Option 1. However, we also consider that there is room for improvement to the *status quo*.

The Consultation Paper does not disclose any evidence as to whether the problem that the Standards Panel faces with regard to complaints about minor breaches is systemic or due to a lack of resources. If the current system is experiencing high levels of delay, then it is possible that the Panel either does not meet often enough or else the Panel has insufficient resources.

The problem is familiar to lawyers as it is similar to that which regularly faces the courts and for which they too receive criticism. Clearly an adjudicative system is at risk of delays from under-resourcing, whether lawyers are involved, as in the court system, or not, as in the Panel system.

There is no evidence that having a multiplicity of determinative bodies will achieve greater effectiveness in the administration of the conduct regulations.

Option 2 effectively transfers the burden of dealing with minor breaches downwards to the particular local government, whose committees will have much less experience than Panel members who have to deal with numerous complaints.

### **Knowledge and experience would be an issue**

The Panel has to deal with a few dozen complaints each year; there were 59 minor breach complaints in 2016/17. Therefore, it has a store of knowledge and experience that ensures a certain consistency of interpretation of the regulations.

On the other hand, a sector committee would be called upon only very infrequently. Statistically, a sector committee might be expected to be called upon once a year. That is a wholly unacceptable level of experience to expect consistency of interpretation and application across the entire sector. Indeed, it also places a great burden on the committee that seeks to do its task diligently. The amount of effort that would be required to master relevant facts and rulings to achieve consistency would be out of all proportion to the need to do justice on the one occasion.

Inconsistencies as to interpretation are likely to lead to a good proportion of sector committee decisions being appealed to the Panel. This would become a separate source of delays and increased costs. One set of costs would be incurred at sector committee level, and another on the appeal to the Panel.

Further, a need to manage the appeal process would complicate the administrative system that the Panel would have to deal with. As any lawyer knows, the paperwork for an appeal is different from the paperwork at first instance.

### **An alternative**

We suggest a modification to the *status quo* as follows.

### **Mediation Process**

Instead of adding another layer of adjudication, the current system could be modified to have a mediation or conciliation process. Sector committees of the kind suggested in Option 2 could indeed be created. However, they would instead be marshalled to act as conciliators or mediators.

A system like this would be consistent with the trend in the court systems of Australia, which now typically contain mediation processes within the litigation process. Such developments have been found to have reduced trial times in courts and tribunals. Such benefits could similarly be available to the Panel.

It can be expected that frivolous complaints are more likely to wilt in the glare of scrutiny by an objective committee. Where a person has misconceived their complaint, the conciliation or mediation process would be a source of clarification and education.

If the experience of the courts and tribunals, including the State Administrative Tribunal, is anything to go by, the Panel should experience a reduction of matters to consider as a result of this modification.

### **Education an additional benefit**

Further, the experience of mediation or conciliation can be an educative one. As issues become clearer during such processes, the complainant and the respondent become more aware of those issues and what the rule or regulation requires and whether the conduct was compliant. This kind of education would be far more potent than any number of training seminars.

## **Mediation: Guidance question**

- 39) Do you support the inclusion of mediation as a sanction for the Panel? Why or why not?

We consider that mediation is a process, not a sanction.

However, as stated earlier in this submission, we consider that a mediation or conciliation process can be a valuable modification to the current Standards Panel processes.

### **Prohibition from attending council meetings: Guidance questions**

- 40) Do you support the Panel being able to prohibit elected members from attending council meetings? Why or why not?
- 41) How many meetings should the Panel be able to order the elected member not attend?
- 42) Should the elected member be eligible for sitting fees and allowances in these circumstances?

As a matter of principle, if a person is elected to office by the power of the ratepayers of their district exercised at the ballot box, then unless there are circumstances that render that person completely unfit for office, even temporarily (e.g. the commission of a serious criminal offence or becoming mentally incapacitated), it should be the ratepayers who should remove that councillor via the ballot box.

### **Compensation to the local government: Guidance questions**

- 43) Do you support the Panel being able to award financial compensation to the local government? Why or why not?
- 44) What should the maximum amount be?

#### **Concept supported**

The Panel should be able to award compensation to the local government in circumstances where the elected member has been found to have committed a major breach of the Rules of Conduct Regulations. Elected members who commit breaches, especially major breaches, cause cost and inconvenience to their local government.

The court system regularly sees awards of costs against a party who has in effect caused that system to mobilise its resources to deal with the issue brought before it. Unsuccessful parties and guilty defendants commonly have costs awarded against them. That conception of justice in relation to costs would not be out of place in Standards Panel processes.

However, the costs practices of the Standards Panel should not be inconsistent with those of the State Administrative Tribunal. It would not do to have inconsistencies of practice between different panels and tribunals in any jurisdiction unless parliament considers that there is some mischief that needs to be addressed. No such mischief is evident from the Consultation Paper.

### **Complaint administrative fee: Guidance questions**

- 45) Do you support this option? Why or why not?
- 46) Do you believe that a complaint administrative fee would deter complainants from lodging a complaint? Is this appropriate?
- 47) Would a complaint administrative fee be appropriate for a sector conduct review committee model? Why or why not?
- 48) What would be an appropriate fee for lodging a complaint?
- 49) Should the administrative fee be refunded with a finding of minor breach or should it be retained by the Department to offset costs? Why or why not?

### **Global complaint administrative fee concept not supported**

This submission does not support the option of charging a fee for lodging a complaint.

If a ratepayer pays rates to their local government in order to obtain good government of their district, they should not have to pay a fee where and using the complaints system to bring an elected member to account for failing, in effect to contribute to good government in their district.

Organisations like the Liquor Commission and the Racing Penalties Appeal Tribunal are not the appropriate bodies to compare with the Department's Standards Panel. The Panel deals with the conduct of public officers whereas those other two bodies deal with parties promoting private interests.

The argument that a complaint lodgement fee would encourage complainants only to lodge a complaint where, in their opinion, there is strong evidence of a breach fails on at least two grounds.

First, it relies on the subjective position of the complainant. It would be reasonable to assume that the typical complainant holds the opinion that there is strong evidence of breach.

Second, it would discourage complainants who believe they do not possess strong evidence of breach, but do possess some weak evidence, which carries the potential of causing investigations that reveal strong evidence of breach.

### **Inappropriate underlying assumption**

Further, a system of charging complainants assumes that the majority of complainants are likely to lodge misconceived or frivolous complaints. A modern civil society should not adopt this assumption with regard to its citizens.

### **Alternative: quick initial assessment of complaints to remove potentially frivolous complaints**

Apart from the question of resourcing, it is also worth exploring whether the administration of complaints to the Standards Panel could be adjusted so as to weed out the frivolous or misconceived complaints that were not removed from the system by the sector committees referred to above in this submission.

Conceptually, complainants would have unhindered access to the Standards Panel system at first instance. There would not be a complaint lodgement fee, but their complaint would be subjected to an initial review. If the review identifies the complaint as being either frivolous or misconceived, the complainant would be asked to show why their complaint should not be dismissed.

### **Special processing fee**

Where the complainant is able to show cause, or if they insist on continuing with the complaint in any case, they can progress their complaint by paying a special processing fee.

Such a fee would be refundable if the matter progresses to a hearing before the Standards Panel and the matter is determined with a decision that the matter was not frivolous or misconceived. On the other hand, if the matter is determined to be frivolous or misconceived by the Standards Panel, then the special processing fee would not be refunded.

## **Cost recovery to local government: Guidance questions**

50) Do you support the cost of the panel proceedings being paid by a member found to be in breach? Why or why not?

Yes. The legal system is a model for this: a guilty defendant or an unsuccessful party is commonly ordered to pay the court's costs and the costs of the prosecutor or



opponent. Accordingly, this submission supports the concept of payment of the cost of panel proceedings by a member found to be in breach.

### **Publication of complaints in the annual report: Guidance question**

- 51) Do you support the tabling of the decision report at the Ordinary Council Meeting? Why or why not?

The decision report is a public document. It is at its most potent at the local level and at a council meeting, which itself is open to the public. It is appropriate that as councillors are public officers, their failure to meet the expected behavioural standards can be the subject of reports that are made public.

### **Tabling decision report at Ordinary Council Meeting: Guidance question**

- 52) Do you support this option? Why or why not?

Yes, we support this, applying the same reasoning as the submission responding to question 51.

### **Elected member interests: Guidance questions**

- 53) Should not-for-profit organisation members participate in council decisions affecting that organisation? Why or why not?
- 54) Would your response be the same if the elected member was an office holder in the organisation?

### **Perception issue with the impartiality interest rule**

The problem with having an elected member disclose an impartiality interest at a council meeting, yet continue to participate in it, is that continued participation implies that Parliament approves of the lack of objectivity in an elected member in these situations. This can dilute the consistency of integrity of decision making in council meetings. It can also give rise to a public perception that an elected member can cast their vote to promote their own interests.

However, this submission acknowledges the challenges that many smaller, country local governments face, one of which is having a small number of elected members. That is why removing the exemption would not be feasible.

However, there are also problems with relying on the rest of councillors to apply the 'trivial and insignificant' test to the question of allowing the elected member to stay in the meeting.

In our experience and also anecdotally, the level of stringency of thinking amongst elected members about what constitutes a 'trivial and insignificant' interest can be low or otherwise be an unreliable method of dealing with the interest. Part of the reason is that the test is subjective and qualitative. It requires no concrete evidence and has no guidelines to render the test more objective.

That is a judgment that can also be very subjective and made without sufficient evidence. Where there has been no reasoning, the decision to allow the elected member to stay can appear opaque.

### **Acknowledgement of the fact – an alternative**

Perhaps a more transparent way to deal with such interests is to have the legislation allow the council to decide about participation by the interested elected member in a more active way.

Such an approach would make it a prerequisite that the council first positively acknowledge the disclosure of the impartiality interest and its nature, consider it and then vote on whether the elected member can stay. The legislation would state that when considering the interest, the council must address the risk of the impartiality interest affecting the fairness and objectivity of the decision of the council on the matter.

A process like this would make it clearer that the council was not simply passively aware of the interest, but had consciously considered its potential influence on the outcome of the decision-making process, after which it resolved to permit, or not refuse, participation.

## 4. Local government administration

### Acting CEOs: Guidance questions

- 61) Should the process of appointing an acting CEO be covered in legislation? Why or why not?
- 62) If so, who should appoint the CEO when there is a short term temporary vacancy (covering sick or annual leave for example)?
- 63) Who should appoint the CEO if there will be vacancy for an extended period (for example, while a recruitment process is to be undertaken)?

It seems logical that if a council is empowered to appoint a CEO pursuant to legislation, then it should be similarly empowered by the same legislation to appoint an acting CEO for the purpose of overseeing the administration during the process of recruiting the permanent CEO.

Where the incumbent CEO is going to be absent or unavailable for only short periods of time, then covering for them constitutes an administrative matter. The CEO can exercise his or her delegated authority in overseeing such an aspect of the administration.

This would reduce the costs and inconvenience of having to call special council meetings to appoint an acting CEO when he or she goes on leave for two weeks, for example.

Where it is clear that the absence of the CEO will be extended (e.g. because of serious illness), then there should be enough time to bring the matter to an ordinary council meeting, which can then appoint an acting CEO, with input from the incumbent CEO.

### Performance review of local government CEOs: Guidance questions

- 64) Who should be involved in CEO performance reviews?
- 65) What should the criteria be for reviewing a CEO's performance?
- 66) How often should CEO performance be reviewed?
- 67) Which of the above options do you prefer? Why?
- 68) Is there an alternative model that could be considered?

## **Termination or extension of CEO contract around an election: Guidance questions**

- 69) Would a ‘cooling off’ period before a council can terminate the CEO following an election assist strengthening productive relationships between council and administration?
- 70) What length should such a cooling off period be?
- 71) For what period before an election should there be a restriction on a council from extending a CEO contract? Should there be any exceptions to this?

### **Legislation not the solution to relationship issues**

It is understandable that stability is desired for a local government with respect to the period shortly after it has held an election. However, it is too optimistic to hope that one can strengthen relationships by legislation.

There are a number of arguments against a “cooling off” period following a local government election.

First, it would reduce one of the freedoms expected in a modern democratic society – in this case, the freedom of contract.

Second, the prospect of making a substantial termination payment can be just as potent as a “cooling off” period following a local government election. Indeed, it can be more conducive to promoting dialogue between the CEO and the council than a process in which a council merely bides its time.

Third, imposing a constraint of this kind on the decision-making powers of councils runs counter to the idea that a council sets the strategy and direction for its local government.

### **An alternative to legislating change**

Instead of legislating change, perhaps the solution for the promotion of stability might be to establish a protocol in which the Department is to be consulted if a newly formed council proposes to put the question of the CEO’s continued employment on the table for discussion within the first three months of election. Under such a protocol, the Department would hold a meeting with the CEO and the council to explore the council’s motivations and direction and test its reasoning.

The arguments against a legislated “cooling off” period also apply with regard to legislating a restriction on a council from extending a CEO contract.

In both situations, one confronts an awkward inconvenience of democracy: that giving power to an electorate necessarily means giving power to their elected representatives to get on with the job of governing.

Placing more and more legislative fetters on the discretions of an elected body symbolises a greater and greater reduction of trust in those people who are elected to that body to represent the community. It also symbolises a reduction of trust in the concept of local democracy.

## 5. Supporting local governments in challenging times

### Remedial intervention: Guidance questions

- 75) Should the appointed person be a departmental employee, a local government officer or an external party? Why?
- 76) Should the appointed person be able to direct the local government or would their role be restricted to advice and support? Please explain.
- 77) Who should pay for the appointed person? Why?

### Powers of appointed person: Guidance question

- 78) What powers should an appointed person have?

### Remedial action process: Guidance questions

- 79) Do you think the proposed approach would improve the provision of good governance in Western Australia? Please explain.
- 80) What issues need to be considered in appointing a person?

### Supporting local governments in challenging times: Guidance question

- 81) Do you have any other suggestions or comments on this topic?

The appointee should be an external party. The most valuable appointee would be someone who has the right kind of experience, particularly in the field of advising and supporting local governments. The three broad organisational areas where deficiencies might be found would seem to be in governance, financial controls and risk management. The skills required to analyse and advise an organisation as to these organisational areas are typically to be found in professional services firms - law firms (for governance), accounting firms (for financial controls) and insurance consultants (for risk management).

The typical senior local government officer may have had the experience of running a local government. However, very few would have had to run (or admit to have run) dysfunctional local governments.

It would be too much to ask of the Department that it have permanently available a division with such skill sets, when interventions might only occur occasionally. There is no evidence in the consultation paper that suggests that poor performance

amongst local governments is rife and that the sector is in need of frequent interventions.

## 6. Making it easier to move between State and local government employment

### Transferability of employees: Guidance questions

- 82) Should local and State government employees be able to carry over the recognition of service and leave if they move between State and local government?
- 83) What would be the benefits if local and State government employees could move seamlessly via transfer and secondment?

### Making it easier to move between State and local government employment: Guidance question

- 84) Do you have any other suggestions or comments on this topic?

In research done by Civic Legal in 2016/17, it emerged that the majority of local governments in Western Australia subscribe to the industrial relations regime that is governed by the *Fair Work Act 2009* (Commonwealth) (“the FWA”). However, the majority of local governments do not fit into the profile of organisation that should be covered by the FWA.

If change is to be effected to enable seamless movement between State and local government employment, then some consideration would need to be given to the following anomaly.

One area of Australian law would regard substantial numbers of WA local government employees as being employees of a “trading corporation”, yet an amended Local Government Act would seek to equalise the status of the local and State government employees. It would therefore regard all of such persons as employees of the public sector, which is not a trading sector.



## 7. Gifts

### A new framework for disclosing gifts: Guidance questions

- 85) Is the new framework for disclosing gifts appropriate?
- 86) If not, why?
- 87) Is the threshold of \$500 appropriate?
- 88) If no, why?
- 89) Should certain gifts – or gifts from particular classes or people – be prohibited? Why or why not?
- 90) If yes, what gifts should be prohibited?

### Excluding gifts received in a personal capacity: Guidance questions

- 91) Should gifts received in a personal capacity be exempt from disclosure?
- 92) If yes, how could 'personal capacity' be defined?
- 93) Should there be any other exemptions from the requirement to disclose a gift over the threshold?
- 94) If so, what should these be? Please justify your proposal.

### Gifts: Guidance question

- 95) Do you have any other suggestions or comments on this topic?

Our experience includes being involved both in responding to tenders and assisting local governments in preparing requests for tender or dealing with matters associated with them.

We have also advised local governments on the acceptance, rejection and reporting of gifts and prepared the Flowchart that was commissioned by the City of Vincent and circulated to the sector by the Department.

In general terms, the gifts provisions are unnecessarily complex and confusing. Our own experience was that it took at least a few days for a two-lawyer team to appropriately convert the information in the Act and the Regulations into a form that was more understandable to lay local government officers and councillors.

It is in our view important both that local government officers' and councillors' decisions are unaffected by their receipt of expensive gifts, and that these same people are able to comfortably understand their obligations in respect of those items.

### **Multiple sources of obligations**

There are presently three sources of obligations: elected members have obligations under the gift disclosure regimes in both the Act and the Regulations, designated employees (including Chief Executive Officers) have obligations under the Act and the local government's statutorily-mandated code of conduct, and other employees only have obligations under the code of conduct. The thresholds in the Act and the Regulations are different, as are the exemptions.

From a legal perspective, these can be difficult to navigate, particularly for elected members.

A prudent approach would be to:

1. provide for all gifts obligations for elected members and designated employees in one piece of legislation; and
2. if those obligations are contained in the Act rather than the Regulations, the Regulations provide for the monetary thresholds for acceptance and disclosure of gifts.

The current approach of mandating a code of conduct for non-designated employees which imposes similar obligations to the legislated obligations is still feasible as those employees are not otherwise bound by a similar, but different, obligation elsewhere.

### **Exemptions from disclosure**

To the extent that there are exemptions from disclosure, we agree that these should be minimal. The present system allows for a range of interpretations and it would be ideal for the legislation not to require a lawyer's assistance, or for the person reading the legislation to consider case law, to determine what certain terms may mean.

### **Adequate consideration**

Some elected members and officers we have interacted with have expressed confusion about the concept of 'adequate consideration', particularly in circumstances where there may be an ongoing generosity.

### **Candidates for State or Federal Office**

Candidates for State or Federal Office are presently covered by the gifts disclosure regime, requiring contributions to their campaign (including by their own Party) to be disclosed under the regime. These candidates are expressly excluded from the

travel contributions disclosure regime. The regimes should be aligned so that either the candidates are excluded for all State and Federal candidacy gifts and contributions to travel, or for neither State and Federal candidacy gifts, nor contributions to travel.

If there were no exemption to disclosure requirements for these candidates, there should be an exemption to any prohibited gift limits, as it would otherwise operate as a *de facto* prohibition against elected members and employees running for State or Federal office.

### **Consolidating ‘gifts’ and ‘contributions to travel’**

The gifts and contributions to travel disclosure regimes would greatly benefit from consolidation. The requirements and exemptions differ in material ways and there have been occasions when we have given advice where the distinction between a gift and a contribution to travel was not immediately clear. For example, accommodation on a stopover is incidental to travel, and a contribution to travel, but accommodation is otherwise considered a gift. We agree with the consultation paper that the two regimes should be consolidated because, contrary to the current regime, contributions to travel are in effect a form of gift.

### **Single threshold of \$500**

Our experience has suggested that the two different regimes caused more confusion in practice than the two different thresholds between gifts that cannot be accepted and gifts that must be disclosed. We have not encountered elected members who have needed to accept gifts higher than \$500 from non-family members, but the question of whether an upper threshold for acceptance for non-family members should be maintained is a political matter.

### **Excluding gifts from relatives**

The relative exemption has been a cause of great confusion in those we have advised. The recommended introduction of foster and adopted children and grandchildren, fiancés and fiancées resolves a large number of concerns. The generally permissive approach to receiving gifts in the Consultation Paper would also be furthered by exempting first cousins.

## 10.Reducing red tape

### Senior employees: Guidance questions

- 112) Is it appropriate that council have a role in the appointment, dismissal or performance management of any employees other than the CEO? Why or why not?

It is not appropriate for a council to have a role in the appointment, dismissal or performance management of any employees other than the CEO. Such matters are human resources management matters. These are operational matters and should remain outside the realm of council.

Council should not even have the power to accept or reject a proposed senior employee. Not only does such a power amount to engagement in operational matters, it could also become a significant source of tension between the CEO and the council in the event that the council rejects the CEO's recommendations.

- 113) Is it necessary for some employees to be designated as senior employees? If so, what criteria should define which employees are senior employees?

It is necessary for some employees to be designated senior employees. Those are the employees with significant and critical responsibilities. Every well-run organisation has senior management. It is no different with local governments.

### Exemption from accounting standard AASB124 - Related party disclosures: Guidance questions

- 114) Are the existing related party disclosure provisions in the Act sufficient without the additional requirements introduced by AASB 124? Why or why not?

The disclosure regime of AASB 124 has a different purpose from the disclosure regime of the Local Government Act and regulations.

The Act and regulations are calculated to ensure transparency through the use of primary and annual returns. Such transparency promotes the integrity of local government decision making.

On the other hand, AASB 124 is calculated to assist the reader of the financial statements of the reporting entity to understand the financial performance of that entity better, including by giving more context to those financial statements.

Comparisons can be made with the disclosure requirements of the Corporations Law. In that regime, directors of publicly listed companies are required to disclose their interests and their transactions with that the shares in the company. Such disclosures give the reader some context to the financial and other public information of the company.

It can be argued that in the public company arena, knowledge about the interests of the directors or other related parties will assist a reader with contextual information such as the strength of business alliances, faith in the company's direction, consistency between a strategy being embarked upon and the shifts in the power structure within the company etc.

Whilst such considerations are not relevant in the local government arena, AASB 124 could still be valuable in providing contextual information such as the volume and value of dealings that an entity related to some elected members conducts with the local government.

Whilst the current disclosure requirements will reveal interests, AASB 124 will reveal the value of such an interest. That in turn will assist to determine whether the interest was relatively small or large in the scheme of things. For example, there would be a difference in context between a disclosure with respect to a transaction worth \$5001 and one worth \$5 million.

Requiring local governments to comply with AASB 124 should enable interested members of the public to form more rational opinions about how their local government is run.