I N D E X

Acting Chief Executive Officer's Report

1 September 2003

ITEMS ON REPORT

PROPOSED CHANGES TO THE BOUNDARY OF ARMADALE REDEVELOPMENT AUTHORITY AREA 1

REVIEW OF THE WALGA MODEL CODE OF CONDUCT 2

COUNCILLORS' INFORMATION BULLETIN ISSUE 17/2003 7

ATTACHMENTS

A-1 Council Resolution of 28 April 2003 re Proposal for a Local Government Disciplinary Tribunal

A-2 The Draft Model titled "Framework for a New System of Scrutiny and Dealing with Misconduct in Local Government

A-3 Discussion Paper on the proposal to establish a regulated Code of Conduct for Local Government

A-4 WALGA Bulletins on "Proposal for a Local Government Disciplinary Tribunal"

CITY OF ARMADALE

Acting Chief Executive Officer's Report

Mayor and Councillors
City of Armadale

Following is my Report for the period
ended 28 August 2003

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1 PROPOSED CHANGES TO THE BOUNDARY OF ARMADALE REDEVELOPMENT AUTHORITY AREA

WARD	:	FORREST; SEVILLE and ARMADALE
FILE REF	:	PSC/38; SCH/2/167
DATE	:	27/8/03
REF	:	JR
RESPONSIBLE MANAGER	:	EDDS
APPLICANT	:	ARMADALE REDEVELOPMENT AUTHORITY
LAND OWNER	:	Various

In Brief:-

Confidential Report sent under separate cover for discussion under "Matters Requiring Confidential Consideration".

NOTE

This Report is Confidential on the basis that it deals with a matter that if disclosed at this time has the potential to reveal information that has a commercial value to a person.

A Confidential Report has been circulated under separate cover.

2 REVIEW OF THE WALGA MODEL CODE OF CONDUCT

WARD	All
FILE REF:	COA/14
DATE	28 Aug 2003
REF	SDS
RESPONSIBLE MANAGER	CEO

In Brief:

- A Reference Group consisting of representatives from WALGA, LGMA and the Dept. of Local Government has been established to review the Model Code of Conduct.
- Due to the lack of enforceability of current Codes of Conduct, the Reference Group has recommended a regulated minimum Code of Conduct.
- A Discussion Paper and a draft framework model has been produced and comments are being sought from Local Governments.
- The Standing Order & House Advisory Group following consideration of the Discussion Paper and the framework model have submitted comments for Council deliberation and subsequent referral to WALGA.

Strategic Implications

Corporate Services

1 Promote an environment across the organization which facilitates shared vision and ownership of corporate objectives.

To achieve this we will:

2.1 Identify and implement mechanisms to improve communication and achieve common understanding of corporate issues and objectives.

Legislation Implications

Section 5.103 of the Local Government Act 1995 – Requires all Councils to have a Code of Conduct for it to be reviewed within (12) months of each ordinary election – the Codes currently are not enforceable.

Council Policy/Local Law Implications

Nil

Budget/Financial Implications

Nil

Consultation

Standing Order & House Advisory Group
WALGA
DOLG

BACKGROUND

In July 2002 the Minister for Local Government and Regional Development established a Reference Group consisting of representatives from WALGA, Local Government Managers' Australia and the Department of Local Government & Regional Development

to develop a framework for a new system of scrutiny and dealing with misconduct in Local Government.

Council at its meeting on 28 April 2003 examined the Proposal for a Local Government Disciplinary Tribunal which was referred to all Local Governments for comment. A copy of the item is included at **Attachment A-1**.

COMMENT

One of the key issues identified by the Reference Group in preliminary consultation with Councils was the lack of enforceability of current Local Government Codes of Conduct. As a consequence, the Reference Group has recommended that a minimum Code of Conduct be enshrined into regulations to the *Local Government* Act. This position has been supported by the Minister for Local Government and the Parliamentary Joint Standing Committee on Delegated Legislation.

A Discussion Paper on the proposal to establish a regulated Code of Conduct for Local Government and a draft framework model has now been produced by the Reference Group to deal with the conduct of councillors.

The Reference Group has also suggested that the proposed Code of Conduct regulations have application to elected members and committee members but not employees. For employees, it has recommended that a separate Code of Conduct would be developed and linked to contracts of employment. Breaches of the employee Code of Conduct would be dealt with by the CEO or designated senior officers via the performance management process. Breaches of the Code by the CEO would be dealt with by the Council.

The following documents were referred to the Standing Order & House Advisory Group (SOHAG) at its meeting held on 19th August 2003 for its preliminary consideration and these are now attached for Council's information.

Attachment A-2 The draft model titled "Framework for a New System of Scrutiny and Dealing with Misconduct in Local Government" developed by the Reference Group;

Attachment A-3 Discussion Paper on the proposal to establish a regulated Code of Conduct for Local Government;

Attachment A-4 WALGA Bulletins on "Proposal for a Local Government Disciplinary Tribunal"; and

SOHAG's discussion on the matter and its comments on specific clauses on the Model Framework for referral to WALGA is as follows:-

General Discussion by SOHAG

- *During Local Government week the Discussion Paper and the draft framework model were discussed and there was considerable debate on various clauses. However, there is uncertainty as to the timeframe for the legislation and whether there is further opportunity for comment/clarification.*

- *There is a statutory requirement for Local Governments to review its Code of Conduct within 12 months of a local government election, i.e. by April 2004 a review needs to be undertaken. In this regard, clarification to be sought from the Department of Local Government on whether the review is to be based on the proposed new Code.*

- *The Discussion Paper and Framework be referred to all councillors for information/comment as soon as possible and that an interim report be submitted to Council outlining SOHAG's comments on various issues raised in the Paper.*

- *Given the new model Code varies considerably to Council's current code, it was suggested that the new code be the subject of a councillors' workshop nearer the date of its implementation.*

Comments by SOHAG on the Discussion Paper and Model Framework

1. Preamble (Box A)

- *It was not considered fair and reasonable that the new Code apply to Committees comprising mainly of community/group representatives e.g. seniors interest advisory committee, youth advisory committee. These committees by their very nature have members of the community who have an interest in those specific areas, are in that particular line of work or have a forte in that area.*

- *A less onerous approach is recommended for committee members who are often volunteers from the community. A simplified code of conduct where declarations can be made as when they arise where conflicts of interest exist would be a more appropriate model.*

4. Reporting breaches of the Code of Conduct Regulations (Box F)

- *It was the view of SOHAG that it would be preferable for the CEO not to be the Complaints Officer rather the role be designated to a Director. The CEO is appointed by the Council and his/her performance is monitored/reviewed by the Council and therefore it would be preferable*

for this officer not to investigate written complaints involving elected members.

6. Disclosure of Personal Interest (Box L)

- *Clarification/interpretation of Clause 12 (a) was sought, i.e. "be made in writing, beforehand or as soon as becoming aware…"*

Quite often it is only during debate does it occur that an elected member has a particular personal interest in the matter – will this involve a break in the proceedings while the member fills out a written declaration? Or can this be done verbally with written advice to follow?

Actions:

1. *WALGA/DOLG be contacted to ascertain timeframe for the legislation and whether there is still an opportunity for comment.*

2. *That the proposed Model Code of Conduct, Discussion Paper and SOHAG's comments as above, be reported to Council with a recommendation that SOHAG's comments be the basis of an initial submission to WALGA/DOLG on the Discussion Paper.*

The draft regulations and the Local Government Disciplinary Tribunal was the subject of discussion at an information forum at Local Government Week this year. WALGA's Governance Policy Team is currently preparing a comparative analysis based on deliberations during Local Government Week for submission to the Reference Group. Hence, there is still an opportunity for Council to provide comments to WALGA within the next week for inclusion in this comparative analysis.

Following consideration by the Reference Group, a report will then be submitted to State Council for endorsement prior to it being referred to the Minister for Local Government and Regional Development.

RECOMMEND

That Council:-

1. receive and note –

a. the information provided on the proposed model Code of Conduct; and

b. the Standing Order & House Advisory Group's (SOHAG) comments on the proposed Model Code.

2. forward to the WA Local Government Association, comments on the proposed Code; namely:-

a. it was not considered fair and reasonable that the new Code apply to committees comprising mainly of community/group representatives;

b. a less onerous approach is recommended for committee members who are often volunteers from the community;

c. it would be preferable for the CEO not to be the Complaints Officer, rather the role be designated to a Director; and

d. the procedure for "disclosure of personal interest" be further clarified with regard to the requirement of this being given in writing before the meeting.

3. be kept informed, by officers, of subsequent discussions/deliberations by WALGA and DOLG on the proposed Model Code.

Moved Cr _____
Motion Carried/Lost (….)

3 COUNCILLORS' INFORMATION BULLETIN – ISSUE NO. 17/2003

WARD	All
FILE REF:	CIB
DATE	28 August 2003
REF	SDS
RESPONSIBLE MANAGER	CEO

In Brief:

- Councillors' Information Bulletin – Councillors are advised to take note of the information submitted in Issue No.17, to be received by Council.

Strategic Implications

Corporate Services

2.1 Identify and implement mechanisms to improve communication and achieve common understanding of corporate issues and objectives.

COMMENT

The following general information and memorandums were circulated in Issue No.17 on 28 August 2003.

Information from City Strategy

Progress Reports & Outstanding Matters

- … Progress Report on Contingency, Operational and Strategic Projects
- … Report on Outstanding Matters – City Strategy Committee

Conference Reports

- … Conference Report – Cr Reynolds-Local Government Week 2003
- … Conference Report – Cr Hodges-Local Government Week 2003
- … Conference Report – A Bruce-Seminar by John Carver

Information from Human Resources

Nil

Correspondence & Papers

- … Local Government News – Issue No.33.03
- … Local Government News – Issue No.34.03
- … Media Release
- ....ALGA Newsletter
- ....Miscellaneous

Information from Development Services

- Report on Outstanding Matters – Development Services Committee
- Health Services Manager's Report for July 2003
- Planning Services Manager's Report for July 2003
- Prostitution Control Bill
- Town Planning Scheme No2 – Amendment Action Table
- PAW Closure Report – significant actions during July 2003
- Subdivision Applications – Recommendation Table (July/Aug 2003)
- Monthly Admin Reports for June 2003
- Building Services Manager's Report for July 2003
- Financial Statements for the period ending 31 July 2003

RECOMMEND

That Council acknowledge receipt of Issue No. 17/2003 of the Information Bulletin.

A F MAXWELL
ACTING CHIEF EXECUTIVE OFFICER

CITY STRATEGY COMMITTEE - Miscellaneous | 31 | 15 APRIL 2003

PROPOSAL FOR A LOCAL GOVERNMENT DISCIPLINARY TRIBUNAL

WARD	ALL
FILE REF:	GOV/51
DATE	15 April 2003
REF	RST
RESPONSIBLE MANAGER	Chief Executive Officer

Strategic Implications

To foster an effective professional environment for the governance and administration of the City's services.

Legislation Implications

The Local Government Act 1995 requires all Councils to develop and review a Code of Conduct. Currently no "punitive" provisions.

Council Policy/Local Law Implications

Dependant on outcome of this proposal, Council may develop Policy on dealing with "disciplinary" matters. It may also determine to refer such matters to a specified body or group.

BACKGROUND

WALGA bulletin No.1 – April 2003 and a recent State Council item considered by the South East Metropolitan Zone of the WA Local Government Association, are attached. **[Refer Attachment A-1 to the Minutes]**

WALGA has established a Reference Group to examine the matter of a Local Government Disciplinary Tribunal.

The Draft Framework for the proposal is with the Minister for Local Government and Regional Development and WALGA is seeking comment from Councils.

COMMENT

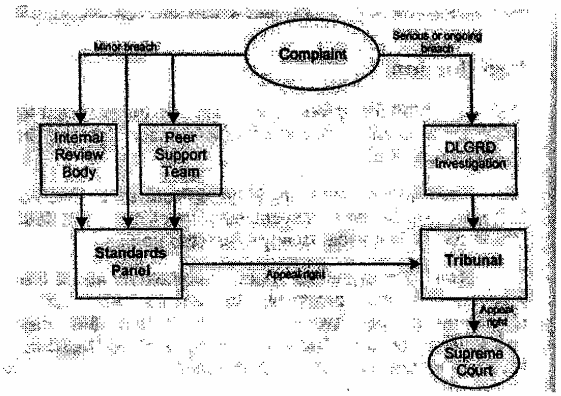
The Local Government Association has advocated for a model:-

- which addresses the wide ranging concerns expressed by Councils;
- which is robust, cost effective and timely;
- which protects the rights of individuals who are subject to complaints;
- which provides appropriate and proportionate sanctions for breaches; and
- which enables local determination of complaints where appropriate.

The Key components of the Tribunal proposal are:-

- Establishment of a legislated minimum Code of Conduct, which will be enforceable;
- New system for internal review of complaints by individual Local Governments in relation to minor Code of Conduct breaches (voluntary);
- Use of Peer Support Teams to mediate and, where possible, resolve complaints of minor Code of Conduct breaches (voluntary);
- Establishment of a Standards Panel to deal with breaches of the Code of Conduct; and
- Creation of a Disciplinary Tribunal to deal with complaints of serious breaches of the Code of Conduct and breaches of the Act.

A diagrammatical representation of the draft Tribunal framework is represented below:



Council might ask the Reference Group to consider the following:- (Reference – the Local Government State Council Item – 2/4/03)

1. Legislating a Minimum Code of Conduct

Support a Model Code (which currently exists) but query why it cannot be framed into Local Laws.

3. Points of Complaints

- Is it appropriate that the CEO be the "default" point of complaint where only elected members involved? Could be the Mayor or President?
- It is not considered appropriate that complaints be "detailed" in Annual Reports.

4. Consideration of breaches

It is not considered appropriate that minor breaches be referred to the Department of Local Government & Regional Development (DLGRD).

6. A Standards Panel

The report makes reference to 3 levels of Standards Panel. Council's would prefer appointment of a Standards Panel from within their own membership, with perhaps one independent member. It would not seem appropriate to have a Standards Panel of all independent persons making judgements on members' actions, as well as an over-arching Tribunal.

8. Role of the Local Government Department

See note on "Breaches" in 4

9. The Local Government Disciplinary Tribunal

- It would seem appropriate that a Local Government Tribunal be independent and not part of a wider State Administrative Tribunal.
- The Tribunal must be able to examine certain matters under the Local Government Act. The current proposal precludes this.

10. Penalties

The Tribunal is proposed to have wide-ranging powers of censure, suspension and disqualification. It will be imperative that natural justice provisions are enshrined in the process.

11. Disciplinary Framework

The process clearly requires further discussion and consultation.

CONCLUSION

The South East Zone has asked that responses from member Councils be considered before any ratification of WALGA's position on this proposal. The Zone also asked why further examination could not be made of the current investigative provisions available to the DLGRD under the current Act?

The above comments are forwarded for discussion and consideration of a Council view.

Committee acknowledged the concept of a Local Government Disciplinary Tribunal but expressed concern with some of the detailed components of the Tribunal proposal. The draft framework as proposed is too stringent i.e. investigative powers of such a Tribunal needs to be refined.

CS21/4/03 RECOMMEND

That Council make submission to the State Council outlining its queries/concerns on the proposal for a Local Government Disciplinary Tribunal.

Moved Cr Zelones
Motion Carried (7-0)

WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Framework for a New System of Scrutiny and Dealing with Misconduct in Local Government

A Local Government Disciplinary Tribunal and Standards Panel

BACKGROUND

For some time now, concerns have been raised about the limited ability for Local Governments to enforce minimum behavioural standards in relation to Council members and the lack of an effective framework to deal with behavioural problems of individual elected members.

Intensifying media and public scrutiny of the internal machinations of Councils and several highly publicised inquiries and investigations into Local Governments has given further weight to the impetus for reforms in this area.

Deficiencies in the current legislative framework limit the capacity within Local Government for dealing with the improper conduct of elected members. Local Government codes of conduct are unenforceable, meaning that there are no ramifications for breaches of the Code.

The current responsibility for administering the investigation and disciplining of elected members resides with the Minister for Local Government and the Department. This gives rise to questions about the appropriateness of this dual role. Local Government is entitled to expect that the body or person responsible for investigating complaints of misconduct undertake that role with appropriate vigour, and that the body which has responsibility for determining whether or not persons are guilty of misconduct are not predisposed in their decision making. Equally, persons who are subject to a complaint alleging misconduct are entitled to expect that the body which determines their guilt or innocence is not the same body that determined an investigation was necessary.

One of the greatest concerns shared by Local Governments is the limitations within the Local Government Act for dealing with a Council where improper conduct or breaches of the Act are proven against one or more elected members. The current system provides only one penalty option – dismiss the entire Council. There is no capacity to deal individually with those elected members who have acted improperly. This is an undesirable way to treat a democratically elected sphere of government.

Following a sustained campaign of lobbying by the Association and LGMA, the Minister for Local Government and Regional Development established a Reference Group in July 2002 to develop a framework for a new system of scrutiny and dealing with misconduct in Local Government.

Membership to the Reference Group included representatives from the WA Local Government Association, Local Government Managers Australia, Department of Local Government and Regional Development, State Ombudsman, Anti Corruption Commission and the Law Society.

The draft framework model which has been produced by the Reference Group is guided by five principles based on those underpinning the recent British proposals to deal with the conduct of councillors.

These principles include:

1. ***the new system must be robust enough to engender public and council member trust;***
2. ***it must avoid duplication and be easy to understand;***
3. ***it must protect the rights of individuals who are the subject of complaints;***
4. ***it must provide appropriate and proportionate sanctions; and***
5. ***it should deal with problems, where possible, close to their source.***

It should be noted that the draft framework model does not address the behaviour of council employees. The Reference Group were of the unanimous view that behavioural concerns associated with employees other than the CEO should be dealt with by the CEO. This accords with relevant industrial laws and the current provisions of the *Local Government Act 1995.*

It is proposed that behavioural concerns in relation to the CEO be addressed through a process designed specifically to deal with such issues. It should be noted, however, that where they are inextricably linked to the behaviour of elected members, the action of employees may necessarily receive consideration and comment through the processes outlined within the framework.

COMMENTS

The draft model developed by the Reference Group centres on the establishment of a multi-faceted framework which includes:

- a regulated **minimum Code of Conduct** to be enforced through the disciplinary framework;
- operation of **Peer Support Teams** and the provision of training and development for elected members on the legislated Code of Conduct.
- formation of **Standards Panels** to deal with breaches of the legislated Code of Conduct; and
- constitution of a **Local Government Disciplinary Tribunal** to handle of breaches of the *Local Government Act*, ongoing breaches of the legislated Code of Conduct, appeals from Standards Panels and breaches of other legislation.

Key aspects of the draft model are detailed below:

1. Regulating a minimum Code of Conduct

The *Local Government Act 1995* requires all Local Governments to develop and regularly review their own Codes of Conduct. Bare minimum provisions are included in the Act (such as dealing with the receipt of gifts) which must be included in all Codes of Conduct.

Following the enactment of the 1995 Act, the Association produced a model Code of Conduct to assist member Councils in satisfying the new legislative requirements. This model Code has been widely adopted by many Local Governments. However, the model is fairly broad in content and is hampered by the limited ability to impose effective disciplinary measures for breaches of the Code. Research undertaken by the Association in late 2002 identified that for the majority of Local Governments, the unenforceability of their Codes remains an ongoing concern.

In May 2002, the Association convened a Technical Working Group to review the effectiveness of the model Code of Conduct and to develop a minimum Code of Conduct. It was proposed that the minimum Code consist of behavioural standards which could be enshrined in regulations to the *Local Government Act* and enforced through an appropriate disciplinary framework.

The Technical Working Group is constituted by representatives from the Association, Local Government Managers Australia and the Department of Local Government and Regional Development.

Within the proposed disciplinary framework, it is recommended that minimum standards of conduct be incorporated into regulations to the *Local Government Act,* thereby achieving application to all Local Governments. Local Governments would retain the individual discretion to add provisions to the minimum Code as required in keeping with local circumstances; however any additional provisions would not be enforceable through the disciplinary framework.

Importantly, a Council would not be able to delete a part of the regulated minimum Code. In this way, the Code would establish universal standards of acceptable conduct for elected members within all Local Governments in Western Australia.

During the consultation process, submissions were received concerning the decision to limit the application of the disciplinary framework to a standardised Code of Conduct rather than individual Local Government Codes of Conduct. Concerns raised centred on the fact that local circumstances often throw up special situations, and the use of a single Code of Conduct would be unlikely to cover all eventualities. Such a predicament could leave an individual Local Government without a process to resolve a local behavioural problem.

The decision by the Reference Group to limit the application of the disciplinary framework to the regulated Code rather than individual Local Government Codes of Conduct was based on the following justifications:

- Most Codes of Conduct are narrative in format and imprecise in language to the extent that enforcing them would be problematic. The Code of Conduct regulations will overcome this by providing specific, clearly defined conduct requirements capable of enforcement.
- Enforcement of potentially 144 different Codes of Conduct could be difficult and unwieldy. A single universal Code which encompasses most behavioural scenarios will streamline and improve the effectiveness of the enforcement function.
- Giving localised Codes of Conduct force and effect under the proposed disciplinary framework could see unreasonable, inappropriate or politically motivated behavioural requirements becoming enforceable. Whilst this remains a remote possibility, the prosect of such actions could undermine the integrity of the framework.

Given these issues, the Reference Group concluded that minimum standards of conduct should be enforceable whilst standards pertaining to local issues should not.

The Association has produced a Discussion Paper on the proposal to establish a regulated Code of Conduct for Local Government, which has now been distributed to all Local Governments for consideration and comment. Included within the Discussion Paper is a set of draft regulations which represent the minimum standards of conduct for Local Government elected members. Key components of the draft regulations include:

- General behavioural obligations for elected members and committee members;
- Requirements not to disclose information designated confidential by the Local Government, unless required by law to do so, or to improperly use information;
- Requirements not to misuse position to confer advantage or disadvantage or seek to improperly influence other elected members, committee members or employees;
- Requirements not to misuse or authorise misuse of Council resources or to improperly use them for electioneering purposes;
- Reporting mechanism for breaches of the Code by an elected member or committee member;
- Protection against vexatious or frivolous complaints;
- Requirement to keep all complaints confidential;
- Introduction of 'personal interests' to replace 'interests affecting impartiality';

- Introduction of 'prejudicial interests' where a personal interest is so significant as to be reasonably regarded by a member of the public with knowledge of the relevant facts as likely to prejudice the elected member's or committee member's judgement of the public interest;
- Restrictions on participation for members with a prejudicial interest; and
- Amendments to the provisions relating to gifts and hospitality – increase to the limit on a token gift to $250, requirement for a Register of Gifts including token gifts.

A copy of the Discussion Paper can be obtained from the following web address - http://www.walga.asn.au/policy/governance/governance_index.htm

2. Types of inappropriate behaviour

The new Code of Conduct being developed will most likely reflect key provisions within the *Local Government Act* (such as declarations of financial interest) as well as other, otherwise non-legislated, requirements (such as to act honestly or respect fellow council members).

Under the scenario of a regulated Code, inappropriate behaviour can be classified into three groupings:

- **A serious breach** - where a provision of the Act or the regulations has been broken (other than a breach of the regulated Code which is not otherwise covered by the Act or regulations);
- **A minor breach -** where an otherwise non legislated provision of the Code has been broken (these breaches will generally relate to behaviour towards fellow Council members); and
- **Ongoing breaches-** where there are repeated minor breaches and these interfere with the operations of the Local Government.

3. Points of Complaints

Within the framework, there would be two points of complaint against alleged inappropriate behaviour. One would be to the Department of Local Government and Regional Development (DLGRD). The second would be to a nominated contact position in each Local Government. Consequently, a legislative change would be necessary to require each Local Government to nominate, and publicise as considered appropriate, a point of contact for a complaint. A complaint could chose to lodge a complaint with either point of contact.

The Association has proposed that any person, whether an elected member, committee member, employee or member of the general public, should be able to make a complaint of an alleged inappropriate behaviour by an elected member. The complaint must be in writing and given in confidence and must:

- identify the complainant and the person against whom the complaint is made;
- set out the details of the alleged breach of the code of conduct regulations;
- give details on the grounds of the complaint; and
- be verified by a statutory declaration.

The default point of contact in a Local Government should be the CEO, with this officer having the power to delegate the function to another person. If the CEO or the alternate point of contact is implicated in the complaint, the complainant would have the opportunity of directly contacting the DLGRD. Serious or ongoing breaches of the Code must be referred to the Director General of the DLGRD.

There would need to be a close interface between each Local Government's point of contact and the DLGRD to ensure the system established by the framework operates to best effect. Local Governments and the DLGRD must keep proper records of complaints and, without identifying complainants, the number and manner in which complaints are dealt with should be detailed in annual reports. Each complainant should receive a formal written response and each point of contact should also provide a confidential report to the DLGRD on each deliberation of the Standards Panel.

The complaints process includes measures to protect against vexatious complainants or frivolous complaints. These include a requirement for a person lodging a complaint to provide their name and include a statutory declaration which verifies the information contained within the complaint. Falsifying information contained within a statutory declaration is a criminal offence and carries a penalty of up to 3 years imprisonment.

4. Consideration of Breaches

The following division of responsibility for consideration of breaches is proposed within the draft disciplinary framework:

- Serious breaches should be considered by the DLGRD;
- Minor breaches should, in the first instance, be considered by the Local Government's own internal review processes. Where resolution is unsuccessful or not agreed to, minor breaches should be referred to the Standards Panel;
- Ongoing minor breaches should be referred to the DLGRD by the relevant Local Government.

5. Dealing with Minor Breaches

The draft framework enshrines the general principle that minor breaches, generally relating to inappropriate behaviours to fellow Council members, should be resolved at the earliest opportunity. Council members, members of Council committees, employees and community members should all be able to raise a concern about a breach of the Code of Conduct with the point of contact. This person would need to determine if the allegation represents a serious breach. If so, the point of contact should refer the issue to the DLGRD. If not, the Council's own processes or a Standards Panel would be used to deal with the matter.

Where a complaint pertains to an allegation of a minor breach, and it is within the public interest, the framework supports the capacity for internal determination of a matter. This can be undertaken through an internal review/ resolution process by the Mayor/President, a committee of Council or an independent third party. Alternatively, the complaint can be determined through a mediation process with a Peer Support Team.

The use of an internal review process or a Peer Support Team requires the consent of both the complainant and the person subject to the complaint. In circumstances where consent cannot be reached, mediation is unsuccessful or public interest requires external determination, complaints will be dealt with through the proposed disciplinary framework. The peak element of the process for dealing with minor breaches is the Standards Panel

6. A Local Government Standards Panel

Under the proposed framework, all Local Governments will be required to establish a Standards Panel consisting of three (3) members external to their Local Government.

The Panel members must be impartial and independent to protect the objectivity of the deliberative process. None of the members may be current or previous Council members, committee members or employees of the relevant Local Government. Of the three members, at least one will be a person with significant knowledge and experience in the operation of a Local Government.

There are no other specific qualifications proposed that would be required by members of the Panel. It is highly likely that the Association, LGMA and/or the Department will be involved in providing training to prospective Standards Panel members in the various roles and requirements of their position, including development of skills in the areas of mediation, conflict resolution, arbitration and conciliation etc.

While local autonomy and flexibility are supported for Standards Panels, the *Local Government Act* should describe the principles under which the Panels must operate. For instance, a Standards Panel must provide a fair hearing, ensure procedural fairness when considering an alleged breach and be objective in its deliberations. It must also provide a right for a person accused to be heard and to respond to allegations. Further, members of the Panel who have a financial or close personal relationship with a person whose actions are under consideration should be disqualified from consideration of the allegations.

Under the framework, Local Governments can establish their own Standards Panels, share a common Panel with other Councils in a region or the Association and LGMA may establish a list of potential members to be utilised by Local Governments in forming a Standards Panel. The list maintained by the Association and LGMA would include persons from remote and regional Western Australia, country urban centres and the metropolitan area. Payment of members to the Standards Panel and other operational matters would be left to the discretion of the relevant Council and the Panel. Departmental guidelines may be useful to assist Councils in these processes. These costs are likely to be minimal and would usually be related to travel and accommodation expenses incurred by Panel members. A nominal sitting fee for Panel members may be applicable.

Persons appearing before a Standards Panel will only be permitted legal representation in the event that the complainant, the person who is the subject of the complaint and the Standards Panel all agree. If any party objects, legal representation will not be permitted. Where it is agreed that legal representation be permitted, each party will bear their respective legal costs. In the event that a Standards Panel concludes that a complaint is vexatious, it may order one of the parties to pay the costs of the other. In the event that legal representation is involved, the Panel may order that one of the parties pay the costs of the other.

Standards Panels would only consider issues covered in the regulated Code (not individual Council additions) and provide written reasons for any decisions they make. They would be empowered under legislation to impose minor penalties for breaches of the Code of Conduct. These may include, for example, censure, requiring a public apology, requirement for training and development or preventing the attendance of a member at a Committee meeting where a breach has occurred. A right of appeal would exist against a decision of the Standards Panel to the Tribunal. If the members of the Standards Panel are divided in their views, it is proposed that the majority view becomes the unanimous decision.

During initial consultation, concern was expressed at the capacity for the proposed Standards Panel to prevent an elected member from attending a particular Committee meeting. The intent behind this provision related to the capacity for a member to disrupt the effective operation of a Council Committee through improper behaviour. The provision would empower the Panel to order a member not to attend a particular Committee for a prescribed period so as to allow the Committee to resume effective operation. Feedback received from member Local Governments during the consultation process supported empowering the Standards Panel to exercise this capacity.

If a person is aggrieved by a decision of a Standards Panel, or the process followed, the draft framework establishes a right of appeal directly to the Disciplinary Tribunal. A fee should be payable for such an appeal, which would be refundable if the appeal is successful. There should also be provision to waive fees in cases of demonstrated hardship.

Where an appeal is made to the Disciplinary Tribunal against a decision of a Standards Panel or the process followed, the Tribunal would have the power to:

- uphold the determination of the Standards Panel;
- overturn the penalty imposed by the Standards Panel; or
- impose such penalties as it considers appropriate.

In circumstances where a person does not comply with a Standards Panel's request for a public apology or training to be undertaken, the Panel should have the ability to recommend that the matter be referred to the Disciplinary Tribunal.

In such circumstances, the Tribunal would use its powers (identified later) to enforce the request. Further, if in its deliberations a Standards Panel becomes aware of allegations of serious breaches or identifies that a serious breach may have occurred, it should refer such matters to the DLGRD.

The draft proposal includes a requirement for all parties to a complaint to keep the matter confidential until such time as a Standards Panel hands down a finding or the Director General of DLGRD determines that the matter is no longer confidential.

7. Interface between Minor and Serious Breaches

It is proposed that the Code of Conduct regulations define what constitutes a minor and serious breach. Minor breaches would generally relate to inappropriate behaviour. A breach of the *Local Government Act* will be classified as a serious breach.

The draft framework proposes that serious breaches should be raised with the DLGRD. However, because the distinction between serious and minor breaches may be difficult to ascertain in the first instance and complainants may be unaware of the distinction, it is likely that many minor breaches may be reported to the Department while many serious breaches may be reported to a Local Government's point of contact.

Cross referral of complaints received between the DLGRD and points of contact in Local Government will therefore be vital following initial consideration. However, the DLGRD should also have a right to require the Local Government's point of contact to put an issue before the Standards Panel, and the Standards Panel should have a right to require the DLGRD to place a matter before the Tribunal. Decisions will also need to be made on 'mixed' breaches where a complaint covers both *Local Government Act* and Code of Conduct matters. It is generally suggested that mixed breaches should be dealt with by the DLGRD.

The Local Government point of conduct would also need to refer ongoing breaches of a Local Government's Code of Conduct to the DLGRD if the Local Government Standards Panel has not been able to resolve the problem. In such cases, the point of contact would need to detail the specific problems encountered and the actions taken.

8. The role of the Department of Local Government and Regional Development

All complaints of a serious or ongoing nature must be referred to the Director General of the DLGRD. Having received and considered a compliant and determined that there is prima facie evidence to suggest that the breach identified is serious, the DLGRD has four options under the proposed framework.

These include:

- refer the matter to the Local Government Disciplinary Tribunal;

- investigate the matter (with the outcome being a dismissal of the allegation, a censure or prosecution);
- investigate the matter and refer it to the Minister with a recommendation to establish an Inquiry Panel; or
- investigate the matter and refer it to another body.

The final three options maintain the current processes within the *Local Government Act* and are not discussed further in the draft framework.

However, it should be noted that the establishment of a Disciplinary Tribunal should, and potentially significantly, reduce the number of matters considered under options two, three and four. This is because the creation of a Tribunal should allow many alleged breaches to be directed to this body, and its processes should enable them to be satisfactorily resolved in a timely and decisive manner before the need for an inquiry arises. Once the Tribunal process has operated for an appropriate trial period, consideration should be given to extending the Tribunal's powers and abolishing Inquiry Panels.

The Association retains the viewpoint that responsibility for Part 8 inquiries under the *Local Government Act* should be referred to the Disciplinary Tribunal. Clearly, there is a political imperative for divesting this responsibility to an independent body such as the proposed Tribunal.

The Association believes the separation of investigative and disciplinary roles is appropriate and will result in a more independent and impartial framework for scrutinising the conduct of elected members.

9. The Local Government Disciplinary Tribunal

The draft framework proposes that the Local Government Disciplinary Tribunal should be established as an element within the State Administrative Tribunal (SAT), which is currently being developed by the State Government. Consequently, it will need to dovetail with SAT processes and procedures. This view accords with the resolution of State Council in October 2002 in relation to the development of the SAT.

The proposal includes a Tribunal membership of three (3) members in the main, although there should be flexibility for one (1) person to sit in appropriate circumstances. Members should have knowledge of, or experience in, the Local Government sector. A Supreme or District Court Judge, or a legal practitioner with such knowledge and understanding, should be the Chair.

The framework includes the following components for the Local Government Disciplinary Tribunal within the SAT.

- **Powers** - the Tribunal should not have specific investigative powers but conduct hearings and/or review information to enable it to determine a matter. Further, the Tribunal should have the power to require or compel people to appear before it.

  It should be noted that the Joint Standing Committee on Delegated Legislation's report on the City of Perth Code of Conduct Local Law recommended that the Tribunal not have the jurisdiction to inquire into offences under the *Local Government Act* or other matters that would properly be within the jurisdiction of a court. This situation is not supported by the Reference Group as the Tribunal, as proposed, provides a cost effective mechanism for dealing with certain breaches of the Act which would otherwise require more elaborate and costly mechanisms to resolve.

- **Procedures** - the Tribunal should operate on an inquisitorial basis, seeking to gather the truth to inform its decision making. It should also act as a mediation or arbitration body where necessary to settle disputes.

To achieve such outcomes, the Tribunal should have the ability to operate in-camera in circumstances where this approach may facilitate a better outcome. In all other circumstances, hearings should be public. The Tribunal should provide written reasons for any decision it makes. The Tribunal should operate in accordance with the principles of procedural fairness and make decisions according to the balance of probabilities. While it would be inappropriate to specifically bar legal representation at Tribunal proceedings, the Tribunal should discourage such practices to keep associated costs down. It should also have the ability to refer a matter on to another body if the Tribunal members believe this would be appropriate.

- **Penalties** - the Tribunal should have the power to impose the following penalties:
  - censure;
  - require a public apology;
  - order an elected member to undertake training;
  - order a Local Government to change its processes;
  - suspend an elected member for up to six months (including a loss of relevant meeting allowances and expenses); and
  - disqualify an elected member for a period not exceeding five years.

  There are a number of issues which must also be considered in relation to the imposition of the above penalties. These include:

  - although the Joint Standing Committee on Delegated Legislation has supported the concept of a Disciplinary Tribunal being given the power to impose fines, the draft framework supports the concept that monetary penalties only be imposed following formal court proceedings. The Tribunal would, however, have the power to order that a member lose relevant meeting allowances and expenses when suspending that person. If allowances are paid annually, the loss would be on a pro-rata basis to the suspension period. Further, if the allowance is paid in advance, the Tribunal could order the repayment of the relevant portion. This principle would also apply in the case of a disqualification;
  - the Tribunal should have the power to issue a suspended penalty;
  - if a person does not undertake training or make a public apology as required by the Tribunal, the Tribunal should be empowered to impose a harsher penalty;
  - the Tribunal should not have the power to disqualify a whole Council and trigger a new election. This is because the Tribunal is designed to be an efficient and effective way of dealing with behavioural problems, not a mechanism for disqualifying a democratically elected Local Government. For such an outcome to occur, the Reference Group considered it appropriate for the Minister for Local Government and Regional Development to participate in the decision making process based on an Inquiry Panel's recommendation; and
  - as the suspension or disqualification of 50% of Council members will preclude a Council from operating (it will not be able to make absolute majority decisions), the Tribunal should not be able to suspend or disqualify this percentage of elected members. Indeed, it could be argued that suspending or disqualifying close to 50% of members could still make it very difficult for a Council to operate effectively. Consequently, the Tribunal should not have the power to suspend or disqualify more than 25% of the members of an individual Council.

- **Representation -** Parties appearing before the Tribunal may have legal representation, though this will not always be necessary as the Tribunal will not be operated as a court of law. It will not be bound by rules of evidence, legal technicalities or form, and should be able to inform itself as it thinks fit in observance of the principles of equity, good conscience and the merits of each matter. The Tribunal will be bound by the rules of natural justice and procedural fairness, and will adopt a process which seeks to minimise the costs to the user.

Those not represented by legal counsel will find the processes and procedures of the Tribunal amenable to this arrangement. Legal costs incurred by parties will generally be borne by each party, though it is proposed that the Tribunal have the discretion to order the applicant to bear the costs of the other party where it establishes that a matter is vexatious.

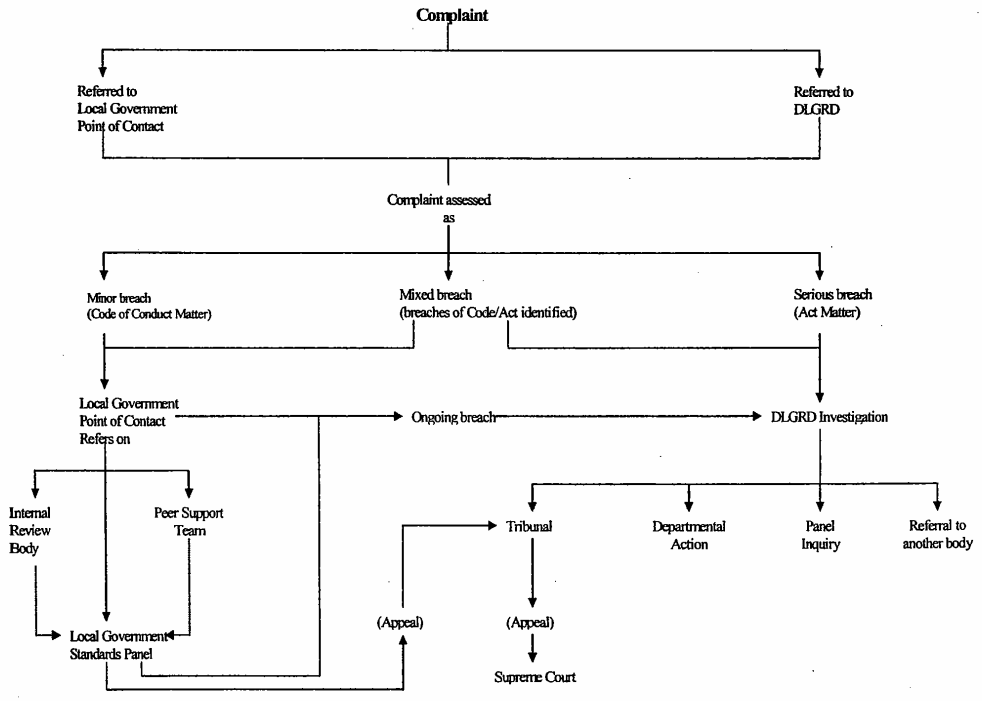
- **Appeals** - a person aggrieved by the operations of the Disciplinary Tribunal should have the power to appeal to the Supreme Court on a point of law. Appeals against decisions of the Tribunal should not be allowed.

- **Costs** - within the Tribunal, it is proposed that administration costs be borne by the State. There may be, however, a nominal fee involved for the applicant. Individual costs such as legal fees (if applicable) and other expenses would be borne by the respective parties (ie the Department and the person subject to the complaint).
  It is proposed that the Tribunal have the power to dismiss or strike out vexatious proceedings and to order costs against an applicant if an element of fault can be substantiated.

Where the Tribunal members are split in their views, the majority view becomes the unanimous decision. Standard provisions relating to the replacement of members and disqualification from sitting where there is a conflict of interest (similar to those which operate for the Local Government Advisory Board) should apply.

10. Diagrammatical Representation of Disciplinary Framework

The operation of the proposed disciplinary framework for Local Government can be represented as follows:



WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Establishing a Regulated Code of Conduct for Elected Members and Committee Members

Discussion Paper

WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

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A. Foreword

For some time, Local Government in Western Australia has been concerned about the escalating number of highly publicised inquiries into the activities of Local Governments. The terms of reference for these inquiries, and the accompanying media coverage, has largely focused on the behaviour of elected members or the action of Councils.

At the same time, concerns continue to mount in relation to deficiencies in the current legislative framework for dealing with the conduct of elected members. Codes of Conduct remain unenforceable, meaning that there are no ramifications for breaches of the Code. In addition, there is no disciplinary framework currently in place to deal with breaches of the Code of Conduct.

The Association has taken these concerns on board and strongly advocated for wide ranging reforms, including a request for a new framework to effectively deal with misconduct. The activities of the Association have been focused in the following areas:

- Formation of the Roles and Relationships Working Party with LGMA and the Department to address issues relating to role confusion and relationship concerns within Local Government;
- Establishment of a Reference Group with LGMA, the Department, the State Ombudsman and the ACC to develop a disciplinary framework for Local Government, including a Disciplinary Tribunal;
- Advocating for a significant overhaul to the existing departmental inquiry process under Part 8 of the Local Government Act; and
- Instituting a Working Group with LGMA and the Department to review the Model Code of Conduct and investigate models of enforceability.

The focus of this discussion paper relates to the review of the Model Code of Conduct. The current provisions of the *Local Government Act* require all Local Governments to adopt and regularly review a Code of Conduct.

The Association produced and distributed a *Model Code of Conduct* in 1996 to assist Local Governments in complying with this legislative requirement. The model Code was adopted by Local Governments, in most cases without amendment.

Given that there has been a reasonable period of practical operation of the Code, the Association established a Technical Working Group to undertake a review of the model Code. Membership to the Working Group included elected members and officers from the Association, representatives from the Local Government Managers Australia and officers from the Department of Local Government and Regional Development.

One of the key issues identified by the Working Group in undertaking the review was the unenforceability of their Codes. A survey which was distributed to all Local Governments late last year confirmed this issue as a major obstacle to the effectiveness of the Code.

In considering various models of enforceability for Codes of Conduct, the Working Group resolved that enshrining a **minimum Code of Conduct into regulations** would be the preferred mechanism.

As such, it undertook to develop a series of Code of Conduct regulations representing the minimum standards of conduct to be observed by elected members and committee members.

The proposed regulations would be mandatory and have application to all Local Governments in Western Australia, thereby achieving consistency. The provisions of the regulations would be enforced through a new disciplinary framework, including a Disciplinary Tribunal. This framework is presently under development by the Association, LGMA and the Department and is the subject of ongoing consultation with members.

Within the proposed Code of Conduct regulations, Local Governments would retain the discretion to add provisions to the minimum Code as required in keeping with local circumstances; however any additional provisions would not be enforceable through the disciplinary framework.

The Working Group recommended that the Code of Conduct regulations have application to elected members but not employees. The decision to exclude employees was reached after careful consideration of the implications in relation to industrial laws and the current provisions of the *Local Government Act.*

It also proposed that a separate Code of Conduct be produced for employees, linked to all contracts of employment, and that breaches be dealt with by the CEO or designated senior officers via the performance management process. Breaches of the Code by the CEO would be dealt with by the Council.

This discussion paper outlines the components of the proposed Code of Conduct regulations which have been developed by the Technical Working Group.

It is important to note that the proposed regulations are conceptual only. They are designed to stimulate discussion on the matters contained within the draft Code of Conduct, with the objective of reaching a common position on the direction forward for Local Government. Whilst the proposed regulations are a product of a tri-partite effort between the Association, LGMA and the Department, they are yet to be formally endorsed by any of these bodies.

The views and comments of Local Governments are sought on the appropriateness of the proposed regulations and whether they are comprehensive enough to capture all potential forms of improper conduct. Relevant provisions which warrant particular consideration have been highlighted through a series of questions contained within the discussion paper.

Submissions received from Local Governments on the proposed regulations will be formally considered by the Working Group and the Governance Policy Team. A final position will then be proposed to State Council for endorsement prior to submission to the State Government.

Should there be a sufficient level of interest in proposed Code of Conduct regulations, the Association will consider holding a series of information forums in various regional centres. It is also planned to hold an information forum on the proposed regulations and the Local Government Disciplinary Tribunal at Local Government Week this year.

B. Code of Conduct Regulations

1. Preamble

1.1 The preamble for the proposed Code of Conduct regulations is included in **Box A** below.

Box A

The Local Government (Code of Conduct) Regulations 2003 provide minimum standards for ethical and professional conduct by elected members and others who may be committee members (as defined in sections 5.8 and 5.9 of the Local Government Act) in Local Government.

Elected members and committee members should behave consistently in a manner that meets or exceeds these minimum standards and reflects the high level of conduct the community is entitled to expect of them. In this way, public confidence in the system of Local Government is enhanced.

The minimum standards contained in the Code of Conduct regulations are mandatory and enforceable. Whilst individual Local Governments have the capacity to add additional standards of behaviour to the regulations, these remain discretionary and are not enforceable.

It is a fact of any working relationship that conflicts will arise from time to time between individuals. Where minor breaches to the Code of Conduct occur, and where it remains in the public interest, elected members and committee members are encouraged in the first instance to seek to resolve matters through the internal review processes within their own Local Government. Where internal review is unsuccessful, a breach is of a serious nature or public interest requires external determination, complaints will be dealt with externally through the Local Government Disciplinary Framework.

1.2 The objective behind the inclusion of a preamble was to facilitate a shared understanding as to the intent and purpose for the Code of Conduct regulations.

1.3 Paragraph 1 provides that the regulations apply to elected members or others who may be committee members as defined under the *Local Government Act*. The regulations do not apply to employees or contractors who are not acting as committee members.

1.4 Paragraph 2 of the preamble provides a general statement as to the expectations of an elected member or committee member in relation to their service to the community. The general sentiment reflects the need to maintain public confidence in the individual and the system of Local Government by observance of acceptable behaviour at all times.

1.5 Paragraph 3 clarifies that the Code of Conduct regulations will be mandatory and have consistent application to all elected members and committee members within Local Government.

During the development of the proposed regulations, it was recognised that Local Government may seek to add additional provisions to the regulated Code which reflect local circumstances or the aspirations of Council. However, any additional provisions will not be enforceable through the disciplinary framework. Importantly, a Council will not be able to delete any part of the regulated Code. In this way, the Code of Conduct regulations will establish universal standards of acceptable conduct for elected members and committee members within all Local Governments in Western Australia.

1.6 Paragraph 4 provides a practical reminder that any working relationship can lead to conflict. Whilst a breach of the Code warrants scrutiny, where the matter is minor and capable of internal resolution, both parties should, where appropriate, pursue an internal process to resolve the issue rather than seeking external determination. In this way, the integrity of working relationships are more likely to be maintained and the framework for scrutinising breaches of the regulated Code is not bogged down with minor matters.

Questions

1. **Do you believe that having an enforceable minimum Code of Conduct for Local Government is necessary? If so, do you support the inclusion of a minimum Code into regulations to the *Local Government Act*?**

2. **Does the preamble provide useful insight into the intent and purpose of the Code of Conduct regulations?**

3. **Is there any additional information which should be contained within the preamble to provide a clear and complete perspective on the intent and purpose of the regulations?**

PART 1
General Provisions

2. Scope

2.1 Clauses 1 and 2 provide the scope for the Code of Conduct regulations (see **Box B**)

Box B

1. *An elected member or committee member must observe the Code of Conduct regulations whenever he or she conducts the business of the Local Government.*

2. *Where an elected member or committee member acts as a representative of the Local Government on any other body, he or she must comply with these regulations.*

2.2 Clauses 1 and 2 provide that the Code of Conduct regulations apply to an elected member or committee member whenever he or she conducts the business of the Local Government, or of the office to which they have been elected or appointed, or acts as a representative of the Local Government.

Therefore, the regulations will apply whenever an elected member or committee member is carrying out official duties, such as meetings of the Local Government or any of its committees, meetings with other elected members and officers, interactions with community members, public meetings or forums, or on any boards or committees.

2.3 It is recognised that where an elected member or committee member is representing their Local Government on an external board or committee, that body may have its own Code of Conduct. In most circumstances, the requirements of these Codes will be consonant with those of the proposed Code of Conduct regulations. However, where the conduct requirements of the board or committee are less than those of the regulations, the regulations will take precedence and govern the conduct of the elected member or committee member on that body.

Questions

4. **Do clauses 1 and 2 make the scope of the Code of Conduct regulations clear?**

5. **Does clause 2 achieve a sensible, workable and clear relationship between the application of the Code of Conduct regulations to the representation by elected members or committee members on external bodies?**

3. General Obligations

3.1 Clauses 3-5 of the Code of Conduct regulations contain a range of general provisions.

Box C

3. An elected member or committee member must-

(a) act with honesty and integrity;
(b) treat others with respect, fairness and equality;
(c) undertake their role with reasonable care and due diligence;
(d) be open and accountable to the public for their actions and the manner in which they carry out their responsibilities;
(e) take account of the views of others in decision making;
(f) not do anything which compromises or which is likely to compromise the impartiality of those who work for or on behalf of the Local Government;
(g) uphold the law and, on all occasions, act in accordance with the trust the public is entitled to place in them;
(h) conduct themselves in a manner that maintains the reputation of their office and Local Government; and
(i) not undertake official duties of their Local Government when impaired by mind affecting substances.

3.2 Provisions (a)-(i) in clause 3 (see **Box C**) represent general ethical principles of public service within Local Government. The Technical Working Group considered these principles to reflect the minimum level of ethical behaviour that all elected members and committee members must observe in discharging their duties for the Local Government.

Box D

4. An elected member or committee member must not -

(a) disclose information relevant to the Local Government which has been given to him or her or acquired by him or her in their official capacity, and has been designated confidential by the Local Government, unless he or she is required by law to do so;
(b) improperly use information; nor
(c) notwithstanding sub-clauses (a) and (b), prevent any other person from gaining access to information to which that person is entitled by law.

3.3 Provisions (a)-(c) in clause 4 (see **Box D**) deal with the treatment of information by elected members and committee members.

Under provision 4(a), an elected member or committee member is required to respect information of a nature designated confidential by the Local Government that has been given to or acquired by him or her.

This requires not divulging it unless it has been deemed no longer confidential by the Local Government, or where there is a legal requirement to do so. This latter provision would mean, among other things, that the confidentiality requirement would be overridden if an elected member or committee member needed to report a matter to the Police or the Anti Corruption Commission, where he or she may be giving evidence in a court of law, or where a breach of the Code has been reported under clause 6.

3.4 Provision (b) in clause 4 makes it a breach of the Code of Conduct regulations to improperly use information. The Australian Oxford Dictionary defines improper as "wrong, incorrect, not conforming to the rules of social or lawful conduct". Where an elected member or committee member uses information whereby fact or truth is distorted, or in a manner which is not in accordance with proper process or as permitted by the Local Government, they have breached this provision.

This provision extends beyond the scope of section 5.93 of the *Local Government Act* in that it does not require the information to have been acquired in the performance by the person of his or her functions under the Act or any other law, nor does it require the person 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. Where any information of the Local Government is used improperly by an elected member or committee member, clause 4 (b) is breached.

3.5 Provision (c) in clause 4 prohibits an elected member or committee member from preventing another person from gaining access to information to which that person is entitled by law. This part of the regulations applies, among other things, to the information to which a person is entitled by virtue of section 5.92 of the *Local Government Act*.

Box E

5. An elected member or committee member must not -

(a) in his or her position, confer improperly on or secure improperly for himself or herself, or any other person or body, an advantage or disadvantage;

(b) in his or her position, seek to improperly influence other elected members, committee members or employees in the performance of their duties or functions for the purpose of gaining advantage or disadvantage for himself or herself or for any other person or body;

(c) when using or authorising the use by others of the resources of the Local Government, misuse or permit their misuse by any other person or body; nor

(d) improperly use resources of the Local Government for electioneering purposes.

3.6 Provision (a) of clause 5 prohibits an elected member or committee member from improperly benefiting from his or her position with the Local Government, or from securing benefits improperly for third parties or external bodies.

The provision also prohibits elected members and committee members from using their position to disadvantage other people (for instance to settle a score or give practical effect to a personal dislike of someone).

3.7 Provision (b) in clause 5 extends the principle espoused in provision (a) to the use of improper influence by an elected member or committee member via their position to influence another elected member, committee member or an employee in the performance of their duties or functions which yields an advantage or disadvantage for himself or herself or a third party or external body.

3.8 Provision (c) in clause 5 places a duty on elected members and committee members to not misuse or permit the misuse of the resources of the Local Government when using them or authorising their use by others. This provision would typically relate to the use of equipment or facilities belonging to the Local Government, or decisions as to levels of hospitality, accommodation on visits and so on. Local Governments should have rules or policies in place relating to such issues, and elected members and committee members will be required under the Code of Conduct regulations to comply with them.

3.9 Provision (d) is clause 5 contains a specific prohibition on improperly using the resources of the Local Government for electioneering purposes.

Questions

6. For each of the provisions of clauses 3 to 5 of the proposed Code of Conduct regulations:

(i) is the requirement placed upon the elected member or committee member fair and reasonable?

(ii) is the meaning sufficiently clear?

(iii) are there any related requirements which the regulations currently omit but which you think should be included?

4. Reporting breaches of the Code of Conduct regulations

4.1 Clause 6-8 of the Code of Conduct regulations deals with the process to be followed in reporting breaches of the regulations.

Box F

6. *A person may, if he or she becomes aware of any conduct by an elected member or committee member which he or she reasonably believes involves a breach of the code of conduct regulations, make a written complaint to that effect to the Complaints Officer within their Local Government or to the Director General of the Department of Local Government and Regional Development as soon as practicable. The complaint must be given in confidence and should:*
   (a) identify the complainant and the person against whom the complaint is made;
   (b) set out the details of the alleged breach of the code of conduct regulations;
   (c) give details on the grounds of the complaint; and
   (d) be verified by a statutory declaration.

4.2 The main thrust of the proposed Code of Conduct regulations is concerned with the conduct of individual elected members and committee members and with the responsibility of individuals for their own conduct. However, the question also arises as to whether and to what extent a person should be required by the regulations to report any potential breaches of the regulations by an elected member or committee member.

4.3 The view of the Technical Working Group was that any person, whether an elected member, committee member, employee or member of the general public, should be able to make a complaint of an alleged breach of the Code of Conduct regulations by an elected member or committee member. The complaint is to be made in writing to the Complaints Officer within the Local Government (CEO or other designated person) or to the Director General of the Department of Local Government and Regional Development. Reporting of the complaint is to be undertaken as soon as possible after the alleged breach. The Working Group stopped short of conferring any duty to report an alleged breach, leaving it to the discretion of individuals.

4.4 Provisions (a)-(d) of clause 6 (see **Box F**) establish the specific process to be followed by a person seeking to lodge a complaint. The objective behind this provision was to require a complainant to provide all relevant information concerning the alleged breach in the complaint, including details of the incident and where a breach of the regulations is believed to have occurred.

To address concerns about the capacity for vexatious or frivolous complaints, the regulations require a person lodging a complaint to provide their name and include a statutory declaration which verifies the information contained within the complaint. Falsifying information contained within a statutory declaration is a criminal offence and carries a penalty of up to 3 years imprisonment.

Box G

7. *A person who has lodged a complaint, or an elected member or committee member against whom a complaint has been made under section 6, must keep confidential all aspects relating to the complaint until such time as the complaint is deemed to be no longer confidential by the person receiving the complaint (either the Local Government Complaints Officer or the Director General).*

4.5 Clause 7 (see **Box G**) requires a person who has lodged a complaint, or the elected member or committee member against whom the complaint has been lodged, to keep the complaint confidential. This measure is to protect the integrity of the complaints process and uphold the right to procedural fairness and natural justice. It is also designed to prevent either party using the lodging of a complaint as a vehicle for attracting media attention or adverse publicity which may have a detrimental impact upon the reputation of the persons involved prior to the complaint being determined. A complaint is to remain confidential until deemed no longer confidential by the person receiving the complaint (either the Local Government Complaints Officer or the Director General).

Box H

8. *The person receiving the complaint (the Local Government Complaints Officer or the Director General) is to give the elected member or committee member against whom the complaint has been made details of the complaint.*

4.6 Clause 8 (see **Box H**) requires the person receiving the complaint (the Local Government Complaints Officer or the Director General) to give the person subject to the complaint details of the complaint. A person who is alleged to have breached the Code of Conduct regulations is entitled to have full access to all details concerning the complaint. The provisions stops short of requiring the name of the complainant to be divulged to the person subject to the complaint, though the person receiving the complaint may in his or her discretion release the identity of the complaint where such release is warranted or with the permission of the complainant.

Questions

7. **Is the complaints process outlined in clause 6 fair and reasonable?**
8. **Is it appropriate to allow discretion in relation to reporting suspected breaches of the regulations by an elected member or committee member? Should there be a specific requirement or duty to report suspected breaches?**
9. **Does the complaints process place too many requirements upon the complainant?**

10. Does the complaints process provide adequate protection against vexatious or frivolous complaints?

11. Are the requirements in clause 7 relating to confidentiality in the complaints process fair and reasonable?

12. Will the confidentiality requirements of the complaints process provide adequate protection for the parties to the complaint?

13. Should the person receiving the complaint (the Local Government Complaints Officer or the Director General) be required to give the person subject to the complaint the identity of the complainant?

PART 2

5. Conflict of Interests

5.1 Clauses 9-10 of the Code of Conduct regulations deal with conflicts of interest by elected members and committee members.

Box I

9. An elected member or committee member must regard himself or herself as having a conflict of interest in any matter when -

(a) he or she has a financial interest (including proximity interest) pursuant to Division 6 Part 5 of the Local Government Act; or
(b) he or she has a personal interest in any matter as defined in section 10.

Box J

10. *An elected member or committee member must regard himself or herself as having a personal interest in any matter if the matter relates to:*

(a) general control or management of a:
- *(i) body to which he or she has been appointed or nominated by the Local Government as its representative;*
- *(ii) public authority or body exercising functions of a public nature ;*
- *(iii) incorporated body, charity or body directed to charitable purposes;*
- *(iv) professional body or association; or*
- *(v) sporting, leisure or social club of any description.*

(b) any subject or matter other than a personal belief or philosophy which significantly affects the elected member or committee member to a greater extent than other Local Government ratepayers or residents of the Local Government generally.

(c) a relative, known friend or known adversary.

5.2 The *Local Government Act* and regulations currently recognise two types of interests – **financial interests** and **interests affecting impartiality**. In relation to financial interests, the Code of Conduct regulations defer to Division 6 Part 5 of the *Local Government Act*.

In relation to interests affecting impartiality, the Code of Conduct regulations proposes that this interest be replaced with a new type of interest referred to as a **personal interest**. A personal interest is defined in section 10 (see **Box J**).

5.3 The rationale behind replacing interests affecting impartiality with personal interests was a desire to overcome some of the current difficulties and uncertainty that have been observed within Local Government in understanding and complying with this requirement.

Many elected members and committee members have difficultly in determining what constitutes an interest which may affect their impartiality. This uncertainty has resulted in varying levels of disclosures between members, often without consistency. Another issue with the current impartiality provisions is the difficulties for elected members and committee members in ascertaining the relative significance of an interest affecting impartiality. There exists uncertainty over what constitutes a serious impartiality interest. Additionally, there is nothing in legislation or regulation which outlines what an elected member or committee member is to do once a disclosure of an interest affecting impartiality has been made.

Many Councils have adopted differing participation rules in relation to the level of involvement an elected member or committee member may have in a matter before Council or a committee once an interest affecting impartiality is disclosed. In some instances, elected members and committee members have dealt with the interest as if it were a financial interest and removed themselves from the Council or committee meeting during discussion on the matter. In other instances, elected members or committee members elect to speak on a matter but not vote. In some cases, elected members or committee members have taken no remedial action after disclosing their interest, despite the fact that their interest was so significant as to be regarded as capable of prejudicing his or her judgement.

5.4 The proposed Code of Conduct regulations provide an opportunity to address the problems that continue to exist with interests affecting impartiality. Clause 10 (see **Box J**) clearly defines when an elected member or committee member must regard themselves as having a personal interest. The reality is that some non-financial interests are shared by all or a large proportion of the public and as such, do not represent a conflict of interest between the elected members' or committee members' private interests and their public duties. As such, these interests do not need to be treated as personal interests or disclosed as such. However, there are non-financial interests that do not fall into this category, such as those listed in clause 10, which must be regarded as personal interests.

These include where an elected member or committee member has general control or management of a:

- body to which they have been appointed or nominate to represent their Local Government;
- a public authority or body exercising functions of a public nature;
- an incorporated body, charity or body directed to charitable purposes;
- a professional body or association; or with a sporting, leisure or social club of any description.

This does not extend to where the elected member or committee member is a member of the body, only where their involvement is in a management or controlling capacity.

5.5 Additionally, clause 10 states that an elected member has a personal interest where there is any subject or matter, other than a personal belief or philosophy, which significantly affects the elected member or committee member to a greater extent than other Local Government ratepayers or residents generally. Finally, clause 10 clarifies that an elected member or committee member has a personal interest where a matter before Council or a committee relates to a relative, known friend or known adversary.

Questions

14. Is the use of "personal interests" in place of "interests affecting impartiality" more clear, understandable and workable?

15. Is the definition of "personal interest" clear and workable or could it be improved in some way?

16. Is the range of circumstances in which elected members and committee members are deemed to have a personal interest correctly drawn?

6. Disclosure of Personal Interests

6.1 Clauses 11 and 12 of the Code of Conduct regulations provide for the disclosure of personal interests.

Box K

11. An elected member or committee member who has a personal interest in any matter, or is likely to be perceived as having a personal interest in any matter which is to be discussed at a Council or Committee meeting to be attended by that elected member or committee member, or in respect of which the elected member or committee member has given or will give advice, must disclose the existence and nature of the interest.

6.2 Clause 11 (see **Box K**) requires an elected member or committee member who has a personal interest in any matter before Council or a committee to disclose the interest. This requires the member to determine whether he or she has a personal interest in the outcome of any issue before them and if so, to undertake to disclose both the existence of the interest and its specific nature. Elected members or committee member can obviously only declare interests that they know about and cannot be blamed if an interest about which they were ignorant came to light.

Where such interests were known, however, an elected member or committee member would have to consider whether he or she had a personal interest as per clause 10 (see **Box J**).

Box L

12. The disclosure of a personal interest in a matter to be discussed at a Council or Committee meeting, or in respect of which an elected member or committee member has given or will give advice, must:-

(a) be made in writing, beforehand or as soon as becoming aware, of the personal interest explaining the nature of the personal interest;
(b) be given to the Chief Executive Officer of the Local Government either before the meeting or as soon as becoming aware of the personal interest, or be made at the time that the advice is given;
(c) if the matter relates to the giving of advice, accompany the advice; and
(d) be recorded in the minutes of the meeting at which the issue is discussed or the advice is considered.

6.3 Clause 12 (see **Box L**) outlines the process that must be followed by an elected member or committee member in disclosing a personal interest in a matter to be discussed at a Council or committee meeting, or where advice has or will be given by that person.

6.4 Elected members and committee members are required under the proposed regulations to declare any personal interest before the issue is considered or (if the interest is not apparent until the issue is under consideration) as soon as the interest becomes apparent.

Clause 12 requires the disclosure of both the existence and nature of any personal interest. Whilst there can be little debate about declaring the existence of a personal interest, some contention may exist about the requirement to also disclose the nature of the interest. The arguments are about openness and accountability on one hand and privacy on the other. Given the significance of the role of elected members and committee members and the importance of public perception, the view of the Working Group was that openness is a more significant consideration.

6.5 Provisions (a)-(d) of clause 12 outline the process that must be followed by an elected member or committee member in disclosing a personal interest. The disclosure must be made in writing, be given to the CEO before the meeting or as soon as becoming aware of the personal interest, accompany any advice given and be recorded in the minutes of the meeting.

Questions

17. Is it reasonable to require elected members and committee members to declare the nature as well as the existence of a personal interest?

18. Is the process which must be followed in declaring a personal interest reasonable and workable?

7. Prejudicial Interests

7.1 Clauses 13 and 14 relate to personal interests of elected members and committee members that are also "prejudicial interests".

Box M

13. Subject to section 14, an elected member or committee member with a personal interest in a matter also has a prejudicial interest in that matter if the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the elected member's or committee member's judgment of the public interest.

7.1 Clause 13 (see **Box M**) requires an elected member or committee member with a personal interest in a matter to consider whether the interest is a **prejudicial interest.** A prejudicial interest exists where the matter of interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice or bias the judgement of that person in regards to the public interest.

7.2 The personal interest declaration requirements are an important instrument of openness and good governance. However, in some circumstances a personal interest will be so significant that, in order to ensure public confidence in the probity of the Local Government, an elected member or committee member should play no part in the consideration of an issue or the giving of advice that has given rise to that interest.

7.3 The Working Group considered that the institution of "prejudicial interest" was a significant improvement over the existing "interests affecting impartiality". The current provisions do not require an elected member or committee member with an interest affecting impartiality to ascertain whether that interest is a prejudicial interest. All interests affecting impartiality, irrespective of their seriousness, are treated the same. The proposed Code of Conduct regulations will see the impartiality provisions replaced with personal interests and prejudicial interests. This allows a determination to be made as to whether a personal interest is insignificant (ie non-prejudicial) or significant (prejudicial). The treatment of personal interests vs. prejudicial interests is addressed in clause 15 (see **Box O**).

Box N

14. An elected member or committee member may regard himself or herself as not having a prejudicial interest in a matter if that matter relates to:-

(a) a Regional Council of which he or she is a member; or
(b) a body to which he or she had been appointed by the Local Government as its representative.

7.4 Clause 14 (see **Box N**) provides two categories of exemption where an elected member or committee member may regard himself or herself as not having a prejudicial interest in a matter.

7.5 The Working Group considered that membership to a Regional Council or to a body where a person is appointed by the Local Government as its representative should not give rise to a prejudicial interest where an issue relating to that Regional Council or body comes before Council or committee.

However, rather than applying a blanket exemption, the Working Group recommended use of the word "may" in relation to making this determination, as this gives the elected member or committee member discretion. Where he or she believes that their personal interest in one or more of the bodies referred to in clause 14 is so significant as to be reasonably regarded as prejudicing their judgement of the public interest, they can treat it as prejudicial and take actions to cease any participation as outlined in clause 15 (see **Box O**). At the same time, an elected member or committee member may chose to regard their interest in one or more of the bodies referred to in clause 14 as not prejudicial and therefore fully participate in consideration of the issue.

This clause will assist in overcoming a problem experienced widely in Local Government. It is recognised that the lack of participation by elected members and committee members with a unique knowledge or understanding of a particular subject, due to a conflict of interest, can disadvantage the quality of decision making. Where it is evident that the decision making of Council or a committee will be disadvantaged through the absence of an elected member or committee member with an interest in one or more of the bodies as defined in clause 14, that person can use the exemption contained in this clause to remain in the meeting and contribute to the debate.

Box O

15. *An elected member or committee member who has a personal interest which is not a prejudicial interest, or to which section 14 applies, may remain in the room or chamber where the meeting is being held and participate in the discussion, exercise deliberative functions and, where relevant, give advice in relation to that matter.*

16. *An elected member or committee member who has a prejudicial interest in any matter must -*

    a. *withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter is being considered at that meeting, unless he or she has obtained a dispensation from a majority of the members of Council who do not have a prejudicial interest or from the Minister;*
    b. *not participate in the discussion, exercise deliberative functions or give advice in relation to that matter; and*
    c. *not seek improperly to influence a decision about that matter.*

7.6 Clause 15 and 16 outline the course of action to be taken by an elected member or committee member who has a personal interest or prejudicial interest in relation to participation in the meeting at which a matter pertaining to that interest will be considered

7.7 Clause 15 (see **Box O**) provides that an elected member or committee member with a personal interest which is not a prejudicial interest, or to which clause 14 applies, may remain in the meeting and participate in debate, vote or give advice.

7.8 The purpose of this clause is to overcome the uncertainty which has existed in regards to what level of participation an elected member or committee member should have where they have had an interest affecting impartiality. The current regulations provide no direction or guidance to a person where such a disclosure has been made. In many instances, members withdraw from the meeting and do not participate in debate irrespective of how significant their interest is. In others, members remain in the meeting where their interests may have been regarded as serious enough to reasonably bias their judgement of the public interest.

7.9 The simplest approach that the Code of Conduct regulations could take would be to treat all personal interests in the same way, requiring any member with such an interest to withdraw from consideration of the issue. But while such an approach would be simple and clear, the price would be a very restrictive approach to member involvement. The Working Group believes that the Code of Conduct regulations should adopt a more measured approach, restricting members' participation only when they have significant conflicts of personal interest.

7.10 Where a member has a personal interest which should not be regarded as prejudicial, or where the interest is not regarded prejudicial under clause 14, the regulations provide that they may remain in the meeting and participate in debate, voting or the provision of advice.

7.11 Where the interest should be regarded as a prejudicial interest, and there is no specific exemption under clause 14, then pursuant to clause 16 the elected member or committee member should abstain from participation in the consideration of the issue that has given rise to that interest.

7.12 Clause 16 outlines the process to be followed by an elected member or committee member who has a prejudicial interest. The person is required to withdraw from the meeting at the start of the consideration of the matter giving rise to the interest or, if the interest is not apparent to the person at the time, then as soon as it becomes apparent. "Meeting" in this context would mean a meeting of the Council or any committee or sub-committee of the Local Government, or a briefing involving the elected member or committee member. Members with a prejudicial interest would also be required to not participate in discussion, voting or giving of advice and not seek to improperly influence decision making on the matter.

7.12 Clause 16 provides the capacity for an elected member or committee member to obtain a dispensation in relation to their prejudicial interest from either the majority of members of Council who do not have a prejudicial interest, or from the Minister. The intention behind this provision is twofold. First, where an elected member or committee member has a prejudicial interest, that person must satisfy a majority of members of Council (who do not have a prejudicial interest) of their capacity to participate in the meeting without bias or prejudice or alternatively, to demonstrate a genuine reason which warrants their participation irrespective of their prejudicial interest. If he or she succeeds in demonstrating this capacity, a dispensation may be granted to facilitate this participation.

The second purpose behind this provision is to address circumstances whereby a majority of Council may be affected by a prejudicial interest. Should a majority of Council be excluded from participating in a meeting, a quorum will not be reached and no decision making can take place on the matter in question. In these instances, affected members may apply to the Minister for a dispensation to facilitate their participation in the meeting where the matter is to be considered. This exemption is particularly applicable to remote and regional Local Governments, where a significant number of Council may be affected by a prejudicial interest at one time. Because of the relatively small populations in these localities, the same people are often involved in positions of management or control over a wide range of community, social or sporting bodies. As such, where an issue comes before Council that involves one of these bodies (such as the local tennis club), the majority of Council may be affected by a prejudicial interest, thereby preventing consideration of the matter. The Working Group sought to overcome this problem by allowing affected members to seek a dispensation from the Minister to allow their participation in considering this matter.

7.13 The Working Group recognised that the proposed approach places an obligation on elected members and committee members to evaluate the significance of any conflict of interest. That evaluation process can to some extent be guided by advice from the Local Government CEO, the Department of Local Government and Regional Development (and in future the Disciplinary Tribunal). But in the final analysis only the member can have a full appreciation of the nature of his or her interest, and the responsibility for applying the test to any particular interest must therefore rest with the member.

7.14 The Working Group regarded the proposed "significance test" as an improvement to the existing "interests affecting impartiality" regulations. The new test requires elected members and committee members to weigh up the significance of their personal interest which is particular to them (rather than shared with the wider public). It also focuses members' attention on the key issue – how a member of the public would perceive the influence of that interest on the members' judgement of the public interest. Nevertheless, the inclusion of such a test inevitably introduces an element of subjective judgement in members' interpretation of the regulations. These judgements have often been the cause of considerable difficulties for elected members and committee members. The precise nature of any particular conflict of interest is often unique to the person. Precedents are therefore difficult to come by, and members have to make their judgements afresh in each new circumstance. To comply with the requirements of the Code of Conduct regulations, elected members and committee members will need to act in good faith and, where they are expected to exercise their judgement about the significance of any conflict of interest, they must do so diligently (including seeking advice where appropriate) and to the best of their ability.

Questions

19. Is the "significance test" for a prejudicial interest clear and workable, or could it be improved in some way?

20. Are the circumstances where an elected member or committee member may regard themselves as not having a prejudicial interest (clause 14) correctly drawn? Are there additional circumstances where an interest may not be regarded as prejudicial that should be included?

21. Do the provisions relating to participation by elected members and committee members in meetings where a (1) personal interest exists (but not a prejudicial interest); or (2) prejudicial interest exists, strike an appropriate balance between propriety, participation and simplicity? Are they reasonable and workable?

22. Is the provision which allows for a dispensation to be granted to a person with a prejudicial interest from either a majority of Council who do not have a prejudicial interest or from the Minister, fair and reasonable?

8. Gifts and Hospitality

8.1 Clauses 17-21 relate to gifts and hospitality which may be received by elected members and committee members.

17. ***In this section:-***

"gift" *means any disposition of property, or the conferral of any other financial benefit, made by one person in favour of another otherwise than by Will (whether with or without an instrument in writing), without consideration in money or money's worth passing from one person in whose favour it is made to the other; or with such consideration so passing if the consideration is not fully adequate.*

It does not include:-

(a) a gift from a relative as defined in section 5.74(1) of the Local Government Act; or
(b) a gift as defined in regulation 30A of the Local Government (Elections) Regulations 1997.

"token gift" *means a gift of, or below, the value of $250.*

18. *An elected member or committee member cannot accept a gift, other than a token gift, from any person who has undertaken, is undertaking or is likely to undertake any dealings with the Local Government or has undertaken, is undertaking or is likely to undertake any business:*

(a) that requires the person to obtain any authorisation from the Local Government;
(b) by way of contract between the person and the Local Government; or
(c) by way of providing any service to the Local Government.

19. *An elected member or committee member who receives, other than in his or her purely private capacity, a gift or other benefit including a token gift, must within 5 days of its receipt, give to the Chief Executive Officer of the Local Government written details of-*

(a) the name of the person who gave, and received, the gift;
(b) the date of receipt of the gift; and
(c) a description, and the estimated value, of the gift.

20. The Chief Executive Officer of the Local Government is to keep a Register of Gifts, including token gifts, and is to include in the Register the details that are given under section 19.

21. If the particular Local Government decides that -
(a) a specified thing given by way of hospitality; or
(b) a thing given by way of hospitality that belongs to a specified class of things,
does not need to be recorded under section 19, the specified thing, and things belonging to the specified class, do not need to be recorded.

8.2 Clause 34B of the *Local Government (Administration) Regulations* currently provides that a Code of Conduct is to contain a requirement in relation to gifts and token gifts. The regulations go on to prescribe instances where a person may or may not receive a gift or token gift, and the requirement for a register of token gifts.

8.3 The Code of Conduct regulations relating to gifts and hospitality as proposed by the Working Group will replace the existing token gifts regulations. The key changes to the manner for dealing with the receipt of gifts and token gifts are as follows:

- Amount for a token gift is fixed at a value of or below $250.
- Expand the restrictions on the capacity for an elected member or committee member to accept a gift. The new regulations propose to restrict receipt of a gift from not only a person who is undertaking or is likely to undertake business with the Council, but also from any person who <u>has undertaken</u> business in the past with the Council.
- Include requirement to register gifts which have been received by an elected member or committee member from a person who has not undertaken, is not undertaking or is unlikely to undertaken business with the Local Government.
- Replace the existing Register of Token Gifts, which excludes gifts which are not token gifts, with a Register for Gifts which includes both gifts and token gifts.

8.4 Clause 21 replicates the existing provision of the *Local Government (Administration) Regulations* dealing with hospitality.

Questions

23. Is it fair and reasonable to extend the provisions of clause 18 to restrict receipt of gifts from persons who <u>have</u> undertaken business with the Local Government in addition to those who are undertaking or are likely to undertaken business?

24. **Is the monetary value assigned to a token gift a fair and reasonable amount?**

25. **Is the proposal to include gifts received by an elected member or committee member, in addition to token gifts, in the Register of the Local Government fair and reasonable? Should token gifts be included in the Register?**

26. **Should the Code of Conduct regulations specify that gifts above a specified amount should become the property of the Local Government? Is so, what should the amount be?**

27. **Should the definition of token gift provide that the total number of token gifts received by an elected member or committee member may not exceed this amount ($250) within a prescribed period of time (for example, one electoral year)?**

C. Summary

The proposed Code of Conduct regulations are enclosed as an **Attachment 2** to this discussion paper. If adopted by the State Government, the Code of Conduct regulations will apply to elected members and committee members of all Local Governments in Western Australia.

The Association seeks the views, comments and feedback from Local Governments on the proposed Code of Conduct regulations and questions raised in the discussion paper. For ease of reference, these are listed below:

1. **Do you believe that having an enforceable minimum Code of Conduct for Local Government is necessary? If so, do you support the inclusion of a minimum Code into regulations to the *Local Government Act*?**

2. **Does the preamble provide a useful background to the intent and purpose of the regulated Code of Conduct?**

3. **Is there any additional information which should be contained within the preamble to provide a clear and more complete perspective on the intent and purpose of the regulations?**

4. **Do clauses 1 and 2 make the scope of the Code of Conduct regulations clear?**

5. **Does clause 2 achieve a sensible, workable and clear relationship between the applications of the Code of Conduct regulations to the representation by the elected member or committee member on another body?**

6. **For each of the provisions of clauses 3 to 5 of the proposed Code of Conduct regulations:**
   - **(i) is the requirement placed upon the elected member or committee member fair and reasonable?**
   - **(ii) is the meaning sufficiently clear?**
   - **(iii) are there any related requirements which the regulations currently omit but which you think should be included?**

7. **Is the complaints process outlined in clause 6 fair and reasonable?**

8. **Is it appropriate to allow discretion in relation to reporting suspected breaches of the regulations by an elected member or committee member? Should there be a specific requirement or duty to report suspected breaches?**

9. **Does the complaints process place too many requirements upon the complainant?**

10. **Does the complaints process provide adequate protection against vexatious or frivolous complaints?**

11. **Are the requirements in clause 7 relating to confidentiality in the complaints process fair and reasonable?**

12. **Will the confidentiality requirements of the complaints process provide adequate protection for the parties to the complaint?**

13. **Should the person receiving the complaint (the Local Government Complaints Officer or the Director General) be required to give the person subject to the complaint the identity of the complainant?**

14. **Is the use of "personal interests" in place of "interests affecting impartiality" more clear, understandable and workable?**

15. **Is the definition of "personal interest" clear and workable or could it be improved in some way?**

16. **Is the range of circumstances in which elected members and committee members are deemed to have a personal interest correctly drawn?**

17. **Is it reasonable to require elected members and committee members to declare the nature as well as the existence of a personal interest?**

18. **Is the process which must be followed in declaring a personal interest reasonable and workable?**

19. **Is the "significance test" for a prejudicial interest clear and workable, or could it be improved in some way?**

20. **Are the circumstances where an elected member or committee member may regard themselves as not having a prejudicial interest (clause 14) correctly drawn? Are there additional circumstances where an interest may not be regarded as prejudicial that should be included?**

21. **Do the provisions relating to participation by elected members and committee members in meetings where a (1) personal interest exists (but not a prejudicial interest); or (2) prejudicial interest exists, strike an appropriate balance between propriety, participation and simplicity? Are they reasonable and workable?**

22. **Is the provision which allows for a dispensation to be granted to a person with a prejudicial interest from either a majority of Council who do not have a prejudicial interest or from the Minister, fair and reasonable?**

23. **Is it fair and reasonable to extend the provisions of clause 18 to restrict receipt of gifts from persons who <u>have</u> undertaken business with the Local Government in addition to those who are undertaking or are likely to undertaken business?**

24. **Is the monetary value assigned to a token gift a fair and reasonable amount?**

25. **Is the proposal to include gifts received by an elected member or committee member, in addition to token gifts in the Register of the Local Government fair and reasonable? Should token gifts be included in the Register?**

26. **Should the Code of Conduct regulations specify that gifts above a specified amount should become the property of the Local Government? Is so, what should the amount be?**

27. **Should the definition of token gift provide that the total number of token gifts received by an elected member or committee member may not exceed this amount ($250) within a prescribed period of time (for example, one electoral year)?**

Attachment 1

The General Principles

Elected members and committee members within Local Government in Western Australia are required to uphold the following eleven ethical principles in their public services:

(1) **Selflessness** – Elected members and employees should serve only the public interest and should never improperly confer an advantage or disadvantage on any person.

(2) **Honesty and Integrity** – Elected members and employees should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.

(3) **Objectivity** – Elected members and employees should make decisions on merit, including when making appointments, awarding contracts or recommending individuals for rewards or benefits.

(4) **Accountability** – Elected members and employees should be accountable to the public for their actions and the manner in which they carry out their responsibilities, and should co-operate fully and honestly with any scrutiny appropriate to their particular office.

(5) **Openness** – Elected members and employees should be as open as possible about their actions and those of their Local Government, and should be prepared to give reasons for those actions.

(6) **Decision Making** – Elected members and employees should take account of the views of others, but should reach their own conclusions on the issues before them and act in accordance with those conclusions.

(7) **Respect for Others** – Elected members and employees must seek to achieve a team approach in an environment of mutual respect, trust and acceptance of their different roles in achieving the Council's objectives.

(8) **Equality** – Elected members and employees should promote equality by not discriminating unlawfully against any person, and by treating people with respect, regardless of their race, age, religion, gender, sexual orientation or disability.

(9) **Duty to Uphold the Law** – Elected members and employees should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them.

(10) **Stewardship** – Elected members and employees should do whatever they are able to do to ensure that their authorities use their resources prudently and in accordance with the law.

(11) **Leadership** – Elected members and employees should promote and support these principles by leadership, and by example, and should always act in a way that secures or preserves public confidence.

Attachment 2

Local Government (Code of Conduct) Regulations (DRAFT)

PREAMBLE

The *Local Government (Code of Conduct) Regulations 2003* provide minimum standards for ethical and professional conduct by elected members and others who may be committee members (as defined in sections 5.8 and 5.9 of the *Local Government Act*) in Local Government.

Elected members and committee members should behave consistently in a manner that meets or exceeds these minimum standards and reflects the high level of conduct the community is entitled to expect of them. In this way, public confidence in the system of Local Government is enhanced.

The minimum standards contained in the Code of Conduct regulations are mandatory and enforceable. Whilst individual Local Governments have the capacity to add additional standards of behaviour to the regulations, these remain discretionary and are not enforceable.

It is a fact of any working relationship that conflicts will arise from time to time between individuals. Where minor breaches to the Code of Conduct occur, and where it remains in the public interest, elected members and committee members are encouraged in the first instance to seek to resolve matters through the internal review processes within their own Local Government. Where internal review is unsuccessful, a breach is of a serious nature or public interest requires external determination, complaints will be dealt with externally through the Local Government Disciplinary Framework.

PART 1

General Provisions

Scope

1. An elected member or committee member must observe the Code of Conduct regulations whenever he or she conducts the business of the Local Government.

2. Where an elected member or committee member acts as a representative of the Local Government or on any other body, he or she must comply with these regulations.

General Obligations

3. An elected member or committee member must -

(a) act with honesty and integrity;
(b) treat others with respect, fairness and equality;
(c) undertake their role with reasonable care and due diligence;
(d) be open and accountable to the public for their actions and the manner in which they carry out their responsibilities;
(e) take account of the views of others in decision making;
(f) not do anything which compromises or which is likely to compromise the impartiality of those who work for or on behalf of the Local Government;
(g) uphold the law and, on all occasions, act in accordance with the trust the public is entitled to place in them;
(h) conduct themselves in a manner that maintains the reputation of their office and Local Government; and
(i) not undertake official duties of their Local Government when impaired by mind affecting substances.

4. An elected member or committee member must not -

(a) disclose information relevant to the Local Government which has been given to him or her or acquired by him or her in their official capacity, and has been designated confidential by the Local Government, unless he or she is required by law to do so;
(b) improperly use information; nor
(c) notwithstanding sub-clauses (a) and (b), prevent any other person from gaining access to information to which that person is entitled by law.

5. An elected member or committee member must not -

(a) in his or her position, confer improperly on or secure improperly for himself or herself, or any other person or body, an advantage or disadvantage;
(b) in his or her position, seek to improperly influence other elected members, committee members or employees in the performance of their duties or functions for the purpose of gaining advantage or disadvantage for himself or herself or for any other person or body;
(c) when using or authorising the use by others of the resources of the Local Government, misuse or permit their misuse by any other person or body; nor
(d) improperly use resources of the Local Government for electioneering purposes.

Reporting breaches of the Code of Conduct regulations

6. A person may, if he or she becomes aware of any conduct by another elected member or committee member which he or she reasonably believes involves a breach of the code of conduct regulations, make a written complaint to that effect to the Complaints Officer within their Local Government or to the Director General of the Department of Local Government and Regional Development as soon as practicable.

The complaint must be given in confidence and should:

(a) identify the complainant and the person against whom the complaint is made;
(b) set out the details of the alleged breach of the code of conduct regulations;
(c) give details on the grounds of the complaint; and
(d) be verified by a statutory declaration.

7. A person who has lodged a complaint, or an elected member or committee member against whom a complaint has been made under section 6, must keep confidential all aspects relating to the complaint until such time as the complaint is deemed to be no longer confidential by the person receiving the complaint (either the Local Government Complaints Officer or the Director General).

8. The person receiving the complaint (the Local Government Complaints Officer or the Director General) is to give the elected member or committee member against whom the complaint has been made details of the complaint.

PART 2

CONFLICT OF INTERESTS

9. An elected member or committee member must regard himself or herself as having a conflict of interest in any matter when -

(a) he or she has a **financial interest** (including proximity interest) pursuant to Division 6 Part 5 of the *Local Government Act*; or
(b) he or she has a **personal interest** in any matter as defined in section 10.

10. An elected member or committee member must regard himself or herself as having a personal interest in any matter if the matter relates to:

(a) general control or management of a:

(i) body to which he or she has been appointed or nominated by the Local Government as its representative;
(ii) public authority or body exercising functions of a public nature ;
(iii) incorporated body, charity or body directed to charitable purposes;
(iv) professional body or association; or
(v) sporting, leisure or social club of any description.

(b) any subject or matter other than a personal belief or philosophy which significantly affects the elected member or committee member to a greater extent than other Local Government ratepayers or residents of the Local Government generally.

(c) a relative, known friend or known adversary.

Disclosure of Personal Interests

11. An elected member or committee member who has a personal interest in any matter, or is likely to be perceived as having a personal interest in any matter which is to be discussed at a Council or Committee meeting to be attended by that elected member or committee member, or in respect of which the elected member or committee member has given or will give advice, must disclose the existence and nature of the interest.

12. The disclosure of a personal interest in a matter to be discussed at a Council or Committee meeting, or in respect of which an elected member or committee member has given or will give advice, must:-

(a) be made in writing, beforehand or as soon as becoming aware, of the personal interest explaining the nature of the personal interest;
(b) be given to the Chief Executive Officer of the Local Government either before the meeting or as soon as becoming aware of the personal interest, or be made at the time that the advice is given;
(c) if the matter relates to the giving of advice, accompany the advice; and
(d) be recorded in the minutes of the meeting at which the issue is discussed or the advice is considered.

Prejudicial Interests

13. Subject to section 14, an elected member or committee member with a personal interest in a matter also has a prejudicial interest in that matter if the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the elected member's or committee member's judgment of the public interest.

14. An elected member or committee member may regard himself or herself as not having a prejudicial interest in a matter if that matter relates to:-

(a) a Regional Council of which he or she is a member; or
(b) a body to which he or she had been appointed by the Local Government as its representative.

Participation in Relation to Disclosed Personal Interests

15. An elected member or committee member who has a personal interest which is not a prejudicial interest, or to which section 14 applies, may remain in the room or chamber where the meeting is being held and participate in the discussion, exercise deliberative functions and, where relevant, give advice in relation to that matter.

16. An elected member or committee member who has a prejudicial interest in any matter must -

(a) withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter is being considered at that meeting, unless he or she has obtained a dispensation from a majority of the members of Council who do not have a prejudicial interest or from the Minister;
(b) not participate in the discussion, exercise deliberative functions or give advice in relation to that matter; and
(c) not seek improperly to influence a decision about that matter.

GIFTS AND HOSPITALITY

17. **In this section:-**

"gift" means any disposition of property, or the conferral of any other financial benefit, made by one person in favour of another otherwise than by Will (whether with or without an instrument in writing), without consideration in money or money's worth passing from one person in whose favour it is made to the other; or with such consideration so passing if the consideration is not fully adequate.

It does not include:-

(a) a gift from a relative as defined in section 5.74(1) of the Local Government Act; or
(b) a gift as defined in regulation 30A of the *Local Government (Elections) Regulations 1997*.

"token gift" means a gift of, or below, the value of $250.

18. An elected member or committee member cannot accept a gift, other than a token gift, from any person who has undertaken, is undertaking or is likely to undertake any dealings with the Local Government or has undertaken, is undertaking or is likely to undertake any business:

(a) that requires the person to obtain any authorisation from the Local Government;
(b) by way of contract between the person and the Local Government; or
(c) by way of providing any service to the Local Government.

19. An elected member or committee member who receives, other than in his or her purely private capacity, a gift or other benefit including a token gift, must within 5 days of its receipt, give to the Chief Executive Officer of the Local Government written details of-

(a) the name of the person who gave, and received, the gift or token gift;
(b) the date of receipt of the gift or token gift; and
(c) a description, and the estimated value, of the gift or token gift.

20. The Chief Executive Officer of the Local Government is to keep a *Register of Gifts*, including token gifts, and is to include in the Register the details that are given under section 19.

21. If the particular Local Government decides that -

(a) a specified thing given by way of hospitality; or
(b) a thing given by way of hospitality that belongs to a specified class of things,

does not need to be recorded under section 19, the specified thing, and things belonging to the specified class, do not need to be recorded.

WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Proposal for a Local Government Disciplinary Tribunal

Bulletin No. 1 – April 2003

In Brief

- **Endemic problems identified with the current framework for dealing with the improper conduct of elected members.**
- **Current inquiry system provides one penalty option – sack the entire Council.**
- **The Association's State Council has given in-principle support to establishing a Disciplinary Tribunal.**
- **Comments and feedback sought from Local Governments on the proposal.**

Introduction

Welcome to the first information bulletin on the proposal to establish a Local Government Disciplinary Tribunal in Western Australia.

This publication is aimed at Mayors/Presidents, Elected Members, CEOs and relevant serving officers, but feel free to distribute it wider to any interested parties.

The bulletin is intended to inform stakeholders about the progress of the proposal, to ensure that Local Governments are aware and understand the key components of the Tribunal model, and to facilitate feedback on any aspects of the proposal.

Regular updates will be provided to member Councils on issues relating to the Tribunal. These updates will include member questions and relevant extracts from any submissions received on the proposal. The next bulletin will focus on answering questions which have been raised by Local Governments in the initial consultation process.

Many people in Local Government will be aware of the increasing number of highly publicised inquiries which have been conducted into the activities of Local Governments. The terms of reference for these inquiries, and the accompanying media coverage, has largely focused on the behaviour of elected members or the action of Councils. Numerous Local Governments, particularly those who have been exposed to a formal inquiry, have expressed significant concerns over the inquiry process, including the policy framework it operates under, procedural effectiveness, time and cost of inquiries and issues relating to procedural fairness and natural justice.

On the other side, concerns continue to escalate in relation to deficiencies in the current legislative framework for dealing with the conduct of elected members.

Codes of conduct are unenforceable, meaning that there are no ramifications for breaches of the Code.

The current responsibility for administering the investigation and disciplining of elected members resides with the Minister for Local Government and the Department. This gives rise to questions about the appropriateness of this joint role – investigator, judge and jury. It also creates uncertainty over the capacity for impartial decision making that is free from political influence.

One of the greatest concerns shared by Local Governments is the limitations available for dealing with a Council where improper conduct or breaches of the Act are proven against one or more elected members.

The current system provides only one penalty option – sack the entire Council. There is no capacity to deal individually with those elected members who have acted improperly. Everybody is dismissed, irrespective of whether they have actually done anything wrong. This is an unacceptable way to treat a democratically elected sphere of government. It also flies in the face of any rights to natural justice and fairness.

It is clear that there is a need for a wider range of penalties other than the option of dismissal. Consultation with Local Governments has shown wide support for a greater range of sanctions where misconduct is proven, ranging from censure at the lower end of the spectrum right through to dismissal as the most serious penalty.

The Association has taken these concerns on board and strongly advocated for wide ranging reforms, including a request for a new framework to effectively deal with misconduct. The current Minister for Local Government, after much negotiation, has given the green light to developing a new framework to address improper behaviour by elected members.

The development of a suitable framework was assigned to a specially convened Reference Group, consisting of representatives from the Association, LGMA, the Department of Local Government and Regional Development, the Ombudsman and the Anti-Corruption Commission.

The Association's role on this Reference Group has been to advocate for:

- a model which addresses the wide ranging concerns expressed by Councils;
- a model which is robust, cost effective and timely;
- a model which protects the rights of individuals who are subject to complaints;
- a model which provides appropriate and proportionate sanctions for breaches; and
- a model which enables local determination of complaints where appropriate.

In April 2003, the State Council and metropolitan and country Zones of the Association considered the first draft of a new disciplinary framework for Local Government, which includes as the key component the establishment of a Disciplinary Tribunal.

The draft framework goes some way to addressing the concerns of Local Governments in relation to the current system for dealing with allegations of improper conduct. However, whilst it provides a new system for scrutinising and dealing with misconduct, it does not address the concerns that are widely held about the process for investigations and inquiries.

The Association is of the firm view that inquiries should sit within the new framework, and has consistently lobbied for this inclusion. The position of the Government to date however, has been that this issue will be re-considered once the trial period for the Tribunal is completed, with a view to eventually abolishing Inquiry Panels.

The Association has been separately pursuing a review of this area with the Director General of the Department. This review has now been given approval to proceed.

Initial consultation on the draft framework identified a number of issues and questions about the proposal. Despite these issues, the vast majority of Zones supported the framework and accordingly, State Council gave in-principle support to the establishment of a Disciplinary Tribunal.

This information bulletin, together with a range of other informational tools, will be employed in the coming months to address issues or questions about the Tribunal proposal, and to ensure that Local Governments are satisfied with the direction that is being taken.

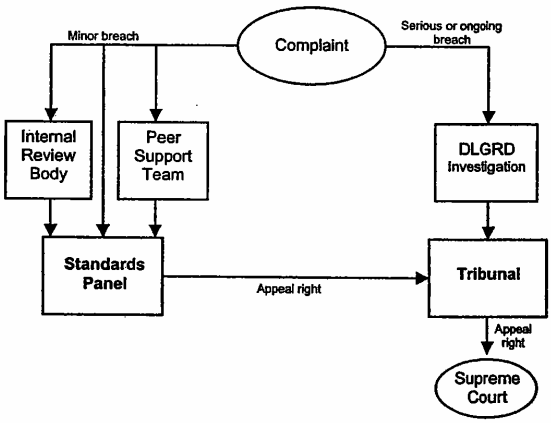
The Association is committed to proceeding cautiously on this matter, given the far-reaching ramifications for Local Government. The consultation process will include actively seeking the comments and feedback of member Local Governments so that these can be incorporated into changes or refinements to the Tribunal model.

Overview on the key components of the Tribunal proposal

The proposal includes the following key features:

- Establishment of a legislated minimum Code of Conduct, which will be enforceable;
- New system for internal review of complaints by individual Local Governments in relation to minor Code of Conduct breaches (voluntary);
- Use of Peer Support Teams to mediate and, where possible, resolve complaints of minor Code of Conduct breaches (voluntary);
- Establishment of a Standards Panel to deal with breaches of the Code of Conduct; and
- Creation of a Disciplinary Tribunal to deal with complaints of serious breaches of the Code of Conduct and breaches of the Act.

A diagrammatical representation of the draft Tribunal framework is represented below:



A copy of the draft proposal can be obtained from the Association's website at www.walga.asn.au.

Comments and Feedback

Information bulletins will be distributed on a regular basis to member Councils. In addition, updates will be included in *Local Government News* and *Western Councillor.* Subject to timing, an information forum may be held as part of Local Government Week.

If you have any questions or would like to make any comments or submissions concerning any aspect of the Tribunal proposal, please contact Nick Wood on 9213 2020 or by e-mail at nwood@walga.asn.au.

All submissions will be considered by the Association's Governance Policy Team, with a view to formulating a position for Local Government to be considered by State Council.

WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Proposal for a Local Government Disciplinary Tribunal

Bulletin No. 2 – April 2003

Welcome to the second information bulletin on the proposal to establish a Local Government Disciplinary Tribunal.

A number of Local Governments have already raised questions and concerns about the draft framework. Responses to many of these issues are outlined below:

Will the proposed framework apply to Local Government CEOs and employees?

No. The draft Tribunal framework will only deal with the conduct of elected members. Behavioural issues concerning employees should be dealt with by the CEO (in accordance with relevant industrial laws) and conduct matters relating to the CEO should be dealt with by the Council.

However, where the behaviour of an employee or CEO is inextricably linked to the behaviour of elected members, the action of the CEO and/or employees may receive consideration and comment in the processes outlined in the framework.

Will the minimum legislated Code of Conduct that has been proposed apply to all Local Governments?

Yes. The legislated Code of Conduct will prescribe minimal behavioural standards that will apply to all elected members in Local Governments around Western Australia.

Individual Councils can choose to add provisions to the legislated Code to reflect their views of best practice, but these additions will not be enforceable. Importantly, no Local Government will be able to delete any part of the regulated Code. The application of a minimum Code of Conduct will achieve consistent behavioural standards across Local Government.

The Association is presently developing the proposed minimum Code of Conduct through a Technical Working Group, which includes representatives from the Association, LGMA and the Department. The minimum Code will shortly be distributed to all Councils for consideration and comment.

Who will be responsible for receiving complaints of breaches of the Code of Conduct?

The framework identifies two points of contact for complaints – the CEO of the Local Government (or another delegated person) and the Director General of the Department.

Complainants can lodge a complaint with either point of contact. If the CEO or delegated person is implicated in the complaint, the complaint should then be referred to the Director General. Serious or ongoing breaches of the Code must be referred to the Director General.

Is there protection against vexatious complaints?

Whilst the draft framework was originally silent on this issue, the Association has advocated successfully for the inclusion of protections against vexatious complainants or frivolous complaints.

Whilst the precise nature of this protection remains under development, it may include the removal of anonymity; a requirement for complaints to be written and accompanied by a statutory declaration; full disclosure of the grounds of a complaint; and the provision of a copy of the complaint (and the identity of the complainant) to the person who is subject to the complaint. It is hoped that such measures will limit the potential for complaints which are vexatious or unsubstantiated.

Must all Local Governments have a Standards Panel and what powers will the Panel have?

Under the proposed framework, all Local Governments will be required to establish a Standards Panel consisting of three (3) members external to their Local Government.

The Panel members must be impartial and independent to protect the objectivity of the deliberative process. Local Governments can establish their own Panels, share a common Panel with other Councils in a region or the Association could establish a Panel (with an appropriate list of members) to be utilised by Local Governments.

Under the proposal, both the complainant and the person subject to the complaint must consent to the matter being heard by a Standards Panel. If one party objects, it is proposed that the matter be referred to the Tribunal.

The Standards Panel would be empowered to impose minor penalties for breaches of the Code of Conduct. These may include, for example, censure, requiring a public apology, requirement for training and development or preventing the attendance of a member at a Committee meeting where a breach has occurred. A right of appeal would exist against a decision of the Standards Panel to the Tribunal.

During initial consultation, concern was expressed at the capacity for the proposed Standards Panel to prevent an elected member from attending a particular Committee meeting. The intent behind this provision related to the capacity for a member to disrupt the effective operation of a Council Committee through improper behaviour. The provision would empower the Panel to order a member not to attend a particular Committee for a prescribed period so as to allow the Committee to resume effective operation. Comments on this issue would be welcomed.

Who pays the costs for the Standards Panel and the Tribunal?

The Tribunal proposal provides for individual Local Governments to bear the costs for convening a Standards Panel. These costs are likely to be minimal and would usually be related to travel and accommodation expenses incurred by Panel members. A nominal sitting fee for Panel members may be applicable.

Where a complaint is determined to be vexatious or frivolous however, it is proposed that the Standards Panel be empowered to require the costs to be borne by the complainant. In the unlikely scenario where legal representation is involved, each party would bear their own costs unless the Standards Panel determines that one of the parties pay the legal costs of the other.

Within the Tribunal, it is proposed that administration costs be borne by the State. There may be, however, a nominal fee involved for the applicant. Individual costs such as legal fees (if applicable) and other expenses would be borne by the respective parties (ie the Department and the person subject to the complaint). It is proposed that the Tribunal have the power to dismiss or strike out vexatious proceedings and to order costs against an applicant if an element of fault can be substantiated.

Is confidentiality to be maintained throughout the complaints process?

The draft proposal includes a requirement for all parties to a complaint to keep the matter confidential until such time as a Standards Panel hands down a finding or the Director General determines that the matter is no longer confidential.

How is a determination made as to what constitutes a minor or serious breach?

It is proposed that the Code of Conduct regulations define what constitutes a minor and serious breach. Minor breaches would generally relate to inappropriate behaviour. A breach of the *Local Government Act* will be classified as a serious breach.

What is the role for the Department under the proposed framework?

The Department will receive complaints of a serious breach and undertake an initial review of the complaint.

On determining that there is prima facie evidence, there are four options available:

- Refer the matter to the Tribunal;
- Investigate the matter (with the outcome being dismissal of the allegation, censure or prosecution);
- Investigate the matter and refer it to the Minister for an Inquiry;
- Investigate the matter and refer it to another body (ie Police, DPP or Anti-Corruption Commission).

The Association believes that responsibility for all inquiries should be transferred to the jurisdiction of the Tribunal and will continue to advocate accordingly.

Will the Tribunal reduce the need for Inquiries?

It is hoped that the Tribunal will allow issues to be dealt with in a timely and effective manner before the need for an inquiry arises. Looking at previous inquiries, there would more than likely have been the capacity to avert the need for an inquiry in many of these instances if a Tribunal could have dealt with improper conduct at any early stage. If the Tribunal functions as proposed, the need for inquiries will undoubtedly decrease.

How will the Tribunal operate?

The framework proposes that the Tribunal be incorporated into the State Administrative Tribunal (SAT). The State Government recommends that this body take over responsibility for all administrative review decisions, in addition to dealing with disciplinary matters for professional bodies (ie Medical, Legal Practice etc).

Indications relating to the SAT are that it will operate on an inquisitorial basis. It will have a mediation and arbitration role and will uphold the principles of procedural fairness and natural justice. Legal representation will be discouraged to minimise costs. The SAT will operate under procedures that ensure timely resolution of matters, are flexible and adaptive and emulate best practice.

Who will sit on the Tribunal?

The proposal includes a Tribunal membership of three (3) members in the main, although there should be flexibility for one (1) person to sit in appropriate circumstances. Members should have knowledge of, or experience in, the Local Government sector. A Supreme or District Court Judge, or a legal practitioner with such knowledge and understanding, should be the Chair.

What penalties will be available to the Tribunal?

Sanctions proposed in the framework which may be applied by the Tribunal include censure, request for a public apology, requirement for training, suspension for up to six months or disqualification for up to five years.

Concern was expressed during initial consultation in relation to the capacity to suspend individual members. Questions arose about the appropriateness of depriving constituents of an elected representative for a period of up to six months.

The inclusion of the suspension power was designed to reflect the current powers available to the Minister. Where an elected member is suspended, the option of temporary commissioners could be explored so as to enable the requirements of his/her position to be fulfilled. The Association is carefully considering this penalty option and would welcome comment from Councils.

Comments and Feedback

If you have any questions or would like to make any comments or submissions concerning any aspect of the Tribunal proposal, please contact Nick Wood on 9213 2020 or by e-mail at nwood@walga.asn.au

WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Proposal for a Local Government Disciplinary Tribunal

Bulletin No. 3 – May 2003

Welcome to the third information bulletin on the proposal to establish a Local Government Disciplinary Tribunal.

Comments and feedback received on the proposal from both elected members and CEOs has been extremely positive. There appears to be a growing consensus within Local Government that the establishment of a Tribunal as a key component of a new disciplinary framework is the right direction forward for our sphere of government.

Submissions received from member Councils have centred upon the endemic inadequacies with the current system for dealing with misconduct by elected members. The reliance on departmental inquiries has been strongly criticised given the far reaching and often detrimental implications that such an intervention can have on the Local Government concerned and its elected members and staff.

Feedback also focused on concerns about the unenforceability of current Codes of Conduct. Both elected members and officers who have commented labelled their current Codes as ineffective and of little value as a management tool given the lack of sanction against those who breach the Code.

Several questions were received as a result of the last information bulletin. The issues raised are addressed below:

Can anyone lodge a complaint concerning an alleged breach of the Code of Conduct?

Yes. Where a person believes that an elected member within a Local Government has breached the Code of Conduct regulations, they may make a formal complaint alleging the breach. This includes other elected members, employees, contractors or members of the general public.

Whilst the specifics of the actual complaints process are still under development, it is likely that lodging a complaint will require the following process:

- written information identifying the complainant and the person against who the complaint is being made;
- written details of the alleged wrongdoing;
- written details of the grounds of the complaint;
- a statutory declaration affirming the above described information.

Is there the capacity for mediation prior to a matter being dealt with through the disciplinary framework?

Yes. This only applies however where the complaint is of a minor breach and the complainant and the person subject to the complaint consent to a process of mediation.

It is a fact of any working relationship that conflicts will arise between individuals from time to time. In the event that a minor breach of the Code of Conduct occurs, and where it remains in the public interest, parties concerned will be encouraged, in the first instance, to seek to resolve matters through the internal review processes within their own Local Government.

This might include, for example, negotiating a resolution to a minor complaint through an independent third party; the use of an internal committee to mediate the resolution of a minor matter; or inviting a Peer Support Team to work with the Council and/or individuals concerned to mediate a satisfactory resolution to the matter.

Where mediation is unsuccessful, a breach is of a serious nature, or public interest requires external determination, complaints will be dealt with through the proposed disciplinary framework.

The use of mediation as a dispute resolution tool will also be available to the proposed Standards Panels and the Tribunal. Both will have the capacity to seek resolution of a matter through conciliation, mediation and other methods, where appropriate, with a view to settling a complaint prior to formal proceedings.

Who undertakes the investigation role for matters referred to the Tribunal?

All complaints of a serious or ongoing nature must be referred to the Director General of the Department, and will be subject to investigation to ascertain whether there is prima facie evidence to substantiate the complaint. Where warranted, a complaint will then be referred to the Tribunal for determination.

It is entirely appropriate that the investigative and regulatory role of the Director General be separate to the adjudicatory and disciplinary functions of the Tribunal. Such separation is considered to be best practice for all disciplinary bodies.

Past criticism has been levelled at the current role of the Department as investigator and judge. Local Government is entitled to expect that the body or person responsible for investigating complaints of misconduct undertake that role with appropriate vigour and that the body which has responsibility for determining whether or not persons are guilty of misconduct are not predisposed in their decision making.

Equally, persons who are subject to a complaint alleging misconduct are entitled to expect that the body which determines their guilt or innocence is not the same body that determined a review was necessary.

The Association believes the separation of investigative and disciplinary roles is appropriate and will result in a more independent and impartial framework for scrutinising the conduct of elected members.

As mentioned in the previous bulletin, the draft framework does not presently provide for the transfer of responsibility for inquiries from the Department and/or Minister to the Tribunal. The Association is of the view that this should occur, and will continue to advocate accordingly.

What are the appeal rights of an aggrieved party?

It is proposed that either party to a complaint heard by a Standards Panel may appeal to the Tribunal against a finding or sanction of the Panel.

A person who is aggrieved with a decision of the Tribunal has a right of appeal to the Supreme Court. Appeals against a decision of the Tribunal must be on a question of law and not on merit or any other factor. There is no further right of appeal proposed.

Will legal representation be permitted?

Under the proposal, persons appearing before a Standards Panel will only be permitted legal representation in the event that the complainant, the person who is the subject of the complaint and the Standards Panel all agree. If any party objects, legal representation will not be permitted.

Where it is agreed that legal representation be permitted, each party will bear their respective legal costs. Where the Standards Panel concludes that a complaint is vexatious, it may order one of the parties to pay the legal costs of the other.

Parties appearing before the Tribunal may have legal representation, though this will not always be necessary as the Tribunal will not be operated as a court of law. It will not be bound by rules of evidence, legal technicalities or form, and should be able to inform itself as it thinks fit in observance of the principles of equity, good conscience and the merits of each matter. The Tribunal will be bound by the rules of natural justice and procedural fairness, and will adopt a process which seeks to minimise the costs to the user. Those not represented by legal counsel will find the processes and procedures of the Tribunal amenable to this arrangement.

Legal costs incurred by parties will generally be borne by each party, though it is proposed that the Tribunal have the discretion to order the applicant to bear the costs of the other party where it establishes that a matter is vexatious.

What is the timeframe for the introduction of the Tribunal legislation?

The provisions which will establish the Tribunal for Local Government are to be included in the State Administrative Tribunal (SAT) legislation.

The SAT legislation, identified as a high priority by the State Government, is currently being drafted. It appears likely that the legislation will be introduced in the Spring Session of 2003.

Comments and Feedback

If you have any questions or would like to make any comments or submissions concerning any aspect of the Tribunal proposal, please contact Nick Wood on 9213 2020 or by e-mail at nwood@walga.asn.au

WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Proposal for a Local Government Disciplinary Tribunal

Bulletin No. 4 – June 2003

Welcome to the fourth information bulletin on the proposal to establish a Local Government Disciplinary Tribunal.

Comments and feedback received from both elected members and CEOs continue to be positive, reinforcing that the establishment of a Tribunal is the right direction forward for Local Government.

Previous bulletins posed a number of questions on the proposed disciplinary framework. Submissions received have supported the following positions:

- Standards Panels should have the power to prevent an elected member who has breached the Code of Conduct regulations from attending a particular Committee meeting. Several submissions supported extending this exclusion to meetings of Council.
- The Tribunal should retain the power to suspend individual members for a prescribed time period.
- Anonymity for complainants should be removed such that unidentified complaints will not be accepted.

Given the interest shown by members in the proposed disciplinary framework, this matter will be the subject of an information workshop to be convened during Local Government Week. The forum will be held at 9.00am on **Tuesday 5 August** at Burswood Convention Centre.

Representatives from the Association, the Department of Local Government and Regional Development and the Local Government Managers Australia will front a panel to facilitate discussion and debate on the Tribunal, disciplinary framework and regulated Code of Conduct. The objective will be to reach an agreed position on the direction forward for Local Government. Councils are encouraged to communicate comments or questions to their delegates who will be in attendance at the workshop.

We also hope to have an updated version of the Tribunal Discussion Paper out to Local Governments shortly. The new version will include refinements resulting from further developments and submissions received from Councils.

Since the last information bulletin, the Association has received a number of submissions raising pertinent issues. Some of these have been addressed below:

What qualifications, skills or experience will the members of the Standards Panels be required to have?

Under the draft disciplinary framework, a Standards Panel will consist of three independent members, none of whom are currently or have been Council members, committee members, or employees of the relevant Local Government.

Of the three members, at least one will be a person with significant knowledge and experience in the operation of a Local Government. There are no other specific qualifications proposed that would be required by members of the Panel.

It is highly likely that the Association, LGMA and/or the Department will be involved in providing training to prospective Standards Panel members in the various roles and requirements of their position, including development of skills in the areas of mediation, conflict resolution, arbitration and conciliation etc.

What happens if there is a conflict of interest between the Standards Panel and the parties concerned?

By requiring Local Governments to select persons external to their own Council, it is hoped that members to the Standards Panel will be independent and impartial. However it is acknowledged that conflicts of interest may occur, particularly in areas where a high level of interaction occurs between Councils.

To address this issue, it is proposed that the Association and LGMA provide a list of people who can be selected by Councils as potential members of a Standards Panel. This listing would include persons from remote and regional Western Australia, country urban centres and the metropolitan area.

In the event of a conflict of interest or reasonable perception of a conflict of interest, the relevant member of the Panel would be required to stand down from the matter and an equivalent replacement member would be appointed to the hearing.

Why is the proposal for internal resolution of complaints voluntary?

The draft disciplinary framework includes the capacity for resolution of complaints of minor Code of Conduct breaches through a resolution process such as internal review by the Local Government.

Such a review would occur by a Committee of Council or the Mayor/President and Deputy Mayor/President, or through mediation by a Peer Support Team.

The use of an internal resolution process is designed to protect the integrity of working relationships within Council. The reality is that conflicts can and do occur in most working environments. Most are relatively minor and capable of resolution without any external intervention.

Whilst recognising the importance of internal resolution of minor matters, the Reference Group considered it inappropriate to compel a person to participate in such a process. As such, it proposed that internal review be voluntary and rely upon the consent of both parties. Where consent is not achieved, an external process (ie Standards Panel) would be utilised to resolve a matter.

Why can't the Tribunal/Standards Panel deal with existing Local Government Codes of Conduct?

One Council questioned why the application of the disciplinary framework was to be limited to a standardised Code of Conduct rather than individual Local Government Codes of Conduct. The submission noted that local circumstances often throw up special situations, and the use of a single Code of Conduct would be unlikely to cover all eventualities. Such a predicament could leave an individual Local Government without a process to resolve a local behavioural problem.

The existing proposal provides that the disciplinary framework will deal with breaches of the Act or contraventions of a regulated Code of Conduct.

It is suggested that the regulated Code will include "minimum standards" of behaviour that elected members within Local Government must observe. The regulations to be developed should cover most if not all types of behaviours. Importantly it will achieve consistent standards for all elected members. Local Governments can add to the minimum standards, but any additions will not be enforceable within the disciplinary framework.

The decision by the Reference Group to limit the application of the disciplinary framework to the regulated Code rather than individual Local Government Codes of Conduct was based on the following justifications:

- Most Codes of Conduct are narrative in format and imprecise in language to the extent that enforcing them would be problematic. The Code of Conduct regulations will overcome this by providing specific, clearly defined conduct requirements capable of enforcement.

- Enforcement of potentially 144 different Codes of Conduct could be difficult and unwieldy. A single universal Code which encompasses most behavioural scenarios will streamline and improve the effectiveness of the enforcement function.

- Giving localised Codes of Conduct force and effect under the proposed disciplinary framework could see unreasonable, inappropriate or politically motivated behavioural requirements becoming enforceable. Whilst this remains a remote possibility, the prosect of such actions could undermine the integrity of the framework.

Given these issues, the Reference Group concluded that minimum standards of conduct should be enforceable whilst standards pertaining to local issues should not. The Association would appreciate further comments or feedback on this matter.

Should the Minister be the only authority capable of disqualifying elected members?

Under the *Local Government Act*, the Minister currently retains the authority to dismiss a Council (through a recommendation to the Governor in Executive Council).

Whilst one submission supported the concept of the Minister retaining the authority to dismiss elected members, others raised concerns about the appropriateness of a political office holder having this power. It has been suggested that the sensitivity and complexity of matters relating to complaints require assessment and determination by an impartial body, rather than through political review. This body, such as the proposed Tribunal, should be independent of executive government and constituted with members possessing specialised skills and relevant expertise.

The Association would welcome any comments or viewpoints on this matter. Should the Tribunal have the authority to disqualify an elected member, or should its powers be limited to recommending to the Minister that a member be disqualified?

What is the timeframe for the introduction of the Tribunal legislation?

We previously advised that the provisions to establish the Local Government Tribunal were to be included in the State Administrative Tribunal (SAT) legislation.

Given tight timeframes for the introduction of the SAT, the Minister for Local Government has now confirmed that the Local Government Tribunal will not be included in the SAT legislation. Though the Tribunal will be constituted and operate under SAT, it will be introduced through a separate piece of legislation. The timeframe for this legislation is yet to be confirmed.

Comments and Feedback

If you have any questions or would like to make any comments or submissions concerning any aspect of the Tribunal proposal, please contact Nick Wood on 9213 2020 or by e-mail at nwood@walga.asn.au