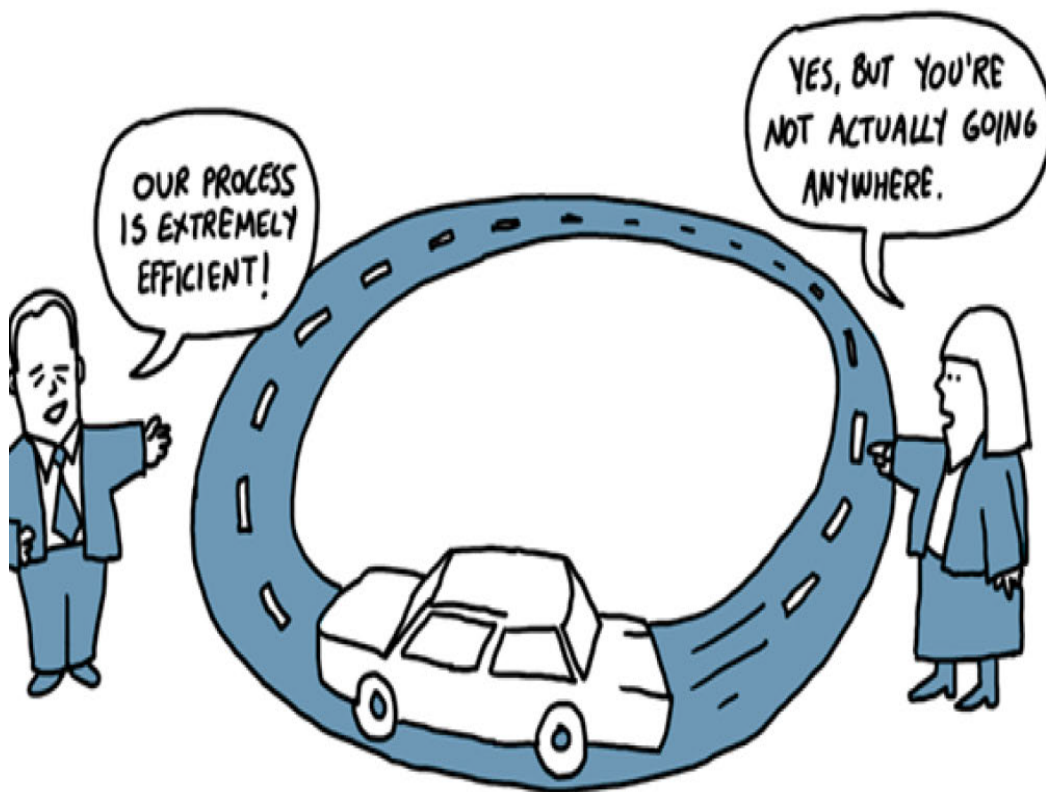


*Yet another review  
of  
the earlier review  
of  
the preceding review  
of  
the first review  
of the  
Local Government Act 1995*



By Larry Graham.

22 January 22

## EXECUTIVE SUMMARY

*To err is human, but to persist (in error) is diabolical." Seneca*

This is a once in a century reform opportunity, and by caving in to vested interests the government has chosen not to reform for the times. Even worse the system being proposed cannot possibly do what is necessary and we will all regret the very bad law that will result from these proposals.

It really is sad when those in power do not understand their time and place in history. To find anyone other than the current Minister for Local Government in Western Australia in a better position to design a system of local government, we must go back to the arrival of Governor Arthur Phillip in 1788. On his arrival in Australia, Governor Phillip had unfettered royal authority to do whatever suited him, since then conservative forces and that damnable democratic thing have curtailed the power of others with grand designs on modernising local government.

But none of those restrictions apply to this minister. Local government not being mentioned in any meaningful way in the last landslide election means the incumbent holds office with no election commitments; there is little effective political opposition and the government he is part of controls both houses of Parliament. All of which gives this minister the power to be brave, break the mould and design a system of local government that would not only suit our times, but also prepare us for the future. But this package of proposals is so poor that it borders on official negligence.

Reviewing laws is a complex task that requires clear heads, good direction, and a deep understanding of what a law is supposed to do. Reviewing complex laws should not be left to those learning on the job and the inexperience and dysfunction of the department administering this law has significantly contributed to this substandard review process. However, it would be a mistake to downgrade the shortcomings of all associated key office holders or to belittle the power of the local government club.

Decision makers have disregarded the lessons from a plethora of official inquiries, Royal Commissions and investigations and have headed off on a whimsical quest for administrative nirvana. Consequentially their proposals:

- reward vested interests, and
- downgrade democracy, and
- gloss over the structural problems of the sector, and
- ignore public office holders' obligations to act in the public interest, and
- reduce oversight of expenditure of public funds, and
- overlook provisions of the WA Constitution.

This meaningful and substantial shift in public administration and law away from competent checks and balances, knowledgeable and experienced oversight, and democratic outcomes towards a laissez-faire system is deeply concerning.

Why would anyone expect there to be improvements in oversight, monitoring and enforcement without any increase in funding? More so when the government's attention has been drawn to the \$9 millions in budget cuts over the last four years; yet this serious issue has been ignored.

The outcome of this review will affect the income and amenity of every family and business in the State because it sets the regulation, oversight, and operation of a government sector that imposes taxes worth more than \$4 billion a year, employs over 16,000 people and manages public assets worth over \$40 billion.

The Royal Commissions into Banking and Casinos raised poor regulatory oversight and disregard for the public interest as the cause of administrative dysfunction as they raised the phenomenon of regulatory capture of regulators by those they are supposed to oversee.

Inquiring into the same department as is conducting this review, the Perth Casino Royal Commission pointed out that regulatory capture was an EXTANT RISK (my emphasis) and said:

*“The most obvious consequence of regulatory capture is that the regulator does not robustly and independently perform its role so as to hold the casino accountable for its conduct, or otherwise ensure that it conforms to its regulatory obligations.”*

Speaking about regulatory capture in the Financial Sector, Royal Commissioner Hayne said:

*“And it is well-established that ‘an unconditional preference for negotiated compliance renders an agency susceptible to capture’ by those whom it is bound to regulate.”*

And

*“Compliance with the law is not a matter of choice. The law is, in that sense, coercive and its coercive character can be neither hidden nor ignored. Negotiation and persuasion, without enforcement, all too readily leads to the perception that compliance is voluntary. It is not.”*

To overcome the identified administrative dysfunction and regulatory capture, both those Royal Commissions have recommended tighter controls; but in a sector that displays similar characteristics to those examined by the inquiries, these proposals head in the opposite direction.

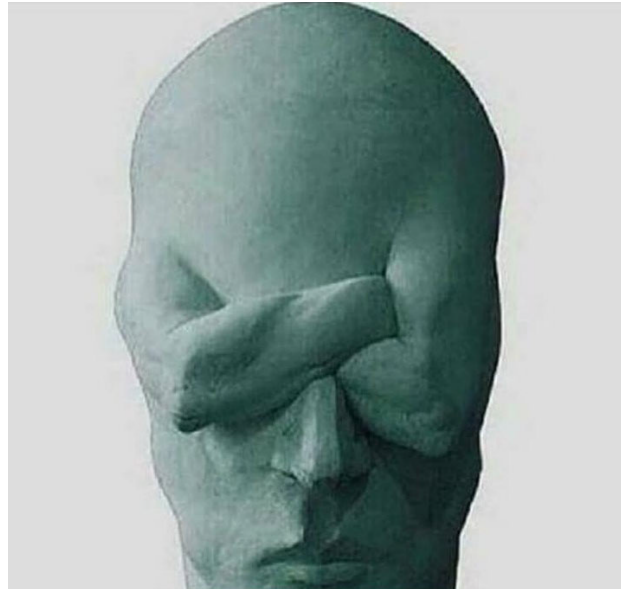
Good public governance requires legislators and regulators to comprehend that the public interest is primary; that systems reliant on good will always fail and also that our systems operate best when there is good legislation and regulation with public officials held to account by strong oversight and compliance monitoring.

This process delivers none of those critical prerequisites for good governance, and if these proposals are implemented, we will deeply regret it, but if the government listen and change direction, the situation is still redeemable. For the public interest to be protected in local government reform:

- That review process needs to be restarted, and
- most of these proposals must be reworked, revaluated and some replaced, and
- the long-awaited green bill needs to be produced, and
- the local government department must be properly funded, and
- significant training is needed at ministerial, departmental, and political levels, and
- funding is required to allow for ongoing and thorough public consultation, and
- the local government partnership with the government must be ended.

## INTRODUCTION

*“It is weakness rather than wickedness which renders men unfit to be trusted with unlimited power.” John Adams*



In this part of this paper, I will make some general comments and then as best I can, I will go through these proposals in as much detail as is possible.

These proposals are so flawed that cabinet should not have allowed them to be released to the public and the proper thing to do was to return them to the authors. This is not a judgement on whether I agree with what is being proposed, it is an informed comment on the poor quality of the content, the inaccuracies, and the low standard of verification and justification of the measures proposed.

In essence the package is little more than a poorly drafted wish list emanating from the government's four-year long review process. It reflects the dysfunction of the sector by being good in places, bad in others, by kowtowing to powerful interests, by downgrading the public interest, and by proposing a system that will not work. And we know what is proposed will not work because history has taught us that systems which dilute oversight; competent regulation, formal checks and balances and replace those things with well-meaning unenforceable provisions, always fail.

These proposals are factually incorrect in places, they are technically incomplete and are so short on supporting information and context that they border on incomprehensible; let me explain.

There was a review process started, there was consultation, an expert committee (albeit a poor one) was formed, a Parliamentary Select Committee was held, and the government responded to its report. But then the review process stopped until these proposals appeared out of the blue. We have no idea who authored them, or what methodology was used to assess the proposals; we do not know if this is the start, middle or finish of the LGA review processes and, even though it is doomed to failure, the minister tells us that the direction is unchangeable.

This unchangeable direction was set by the Government's official partners, the WA Local Government Association (WALGA) and the Local Government Professionals (WA) (LG Pro) through their submissions to the review of the Local Government Act 1995 (LGA). These three partners are colloquially referred to as the local government club.

Astonishingly, 81% of WALGA's recommendations either benefited administrators, disadvantaged the public interest or both; and for LG Pro that figure was 68%. Even more astonishingly, this package of proposals grants most of the major points that those two self-serving bodies sought. WALGA's recent advertorial confirms that involvement:

*"Many of the initiatives outlined as a part of the package have been informed by engagement between our Members and the Minister for Local Government"*

And

*"Key initiatives in the reforms that the Local Government Sector has been advocating for include....."*

WALGA's advertorial then lists many of the more controversial changes that are proposed.

Clearly the local government club have got most of what they were seeking; but as they have taken the government captive, it is valid to ask who is protecting the public interest and how did we get into this mess?

The Local Government Act (1995) was passed by the Court Liberal government after successive ministers undertook widespread consultation, engaged with knowledgeable people, and used their intelligence when drafting the new law.

Introduced by Minister Paul Omodei, this act reformed the antiquated system of local government in the State. Seven years after that tedious but thorough process started, Omodei got universal support for a new system of local government and enshrined it in a good law that fundamentally transformed the sector from the old road board model into the more modern system of local governments.

Since then, successive ministers have tried to legislatively micro-manage the sector by tinkering with the Act. So, in 2017, when the incoming government announced a full review of the LGA, many of us hoped that after more than two decades of serial amendments, there would be a modernisation of what is now a tired old law.

It is not that the LGA is a particularly bad act, because it is not, but it is dated and modern laws are not so prescriptive, they clearly define roles and functions, create powers, offences and penalties while leaving the detail to regulations. This modern approach produces smaller and easier to follow laws, allows far quicker regulatory responses to changing circumstances and helps ensure that the intent of the law is met, rather than have minimal compliance with specific provisions of the law.

Such laws provide legislative certainty with regulatory flexibility and responsiveness while simultaneously maintaining and reinforcing Parliament's prominence in legislating and overseeing regulation. These new proposals can only make an already huge act with its complex regulatory regime, even bigger and more complex.

The government announced its intention to produce a green bill and consult widely about its provisions, Minister Templeman on 9 April 2019 said:

*“We are on track to deliver quality reform to the local government sector. I thank all those who have been involved so far. We look to use the information that has been collected to begin to discuss and draft responses and, indeed, formulate a green bill. We want to make sure that we create a green bill that we can further consult on before we bring landmark reform legislation to Parliament in the near future.”*

So, in April 2019, a green bill and consultation were coming “in the near future”, but some six months later when little had eventuated, further parliamentary questions were asked by Dr Honey MLA:

#### *Question*

- (1) When did the State Government decide it would have a Local Government Green Bill (the planned second phase Local Government Act Amendment Bill)?*
- (2) When did the Government begin drafting the proposed new Bill?*
- (3) Who is responsible for drafting the proposed Bill?*
- (4) When is this proposed Bill to be released for public review?*

*Answered on 15 October 2019*

- (1) During 2018*
- (2-3) Drafting has not commenced.*
- (4) The Bill will be released for consultation once it has been drafted.*

And

#### *Question*

*How will the public be able to have input into the Local Government Green Bill (the planned second phase Local Government Act Amendment Bill) before it is introduced into Parliament?*

*Answered on 15 October 2019*

*A Green Bill by definition is a Bill prepared for public comment before introduction into Parliament.*

The government’s preferred way forward was through the impending green bill and ongoing public consultation. In November 2020 the Minister confirmed this in the government’s response to the Upper House Select Committee Report, which said:

*“During the development of a new Local Government Act, there will be further opportunities for input from the community and local government sector before a draft Bill is released for an extensive submission period.”*

The government was not only keen to allow unrestricted public input into developing a new act, but also there was to be an ability for more public input on the yet undrafted bill as the department advised the Select Committee:

*“Mrs SIEKIERKA: The review of the act is a major piece of work; it will go on for a number of years. For example, Parliament has just passed the first lot of reforms from that. We are in the process of implementation, and that could take some considerable time. It does not stop when Parliament passes the legislation. There are regulations to prepare and guidance material to support local governments and community to make changes. I do not think it will ever really be finished. We are planning to have a green bill to release to the community in this term of government, which will incorporate the findings from the latest set of reforms and consultation.*

*The CHAIRMAN: I think that was probably the best I was searching for—so a green bill. This term of government is what—March 2021? Are you able to indicate an approximate date you are targeting?*

*Mrs SIEKIERKA: Not more than that. Given that it is a whole new local government act, it is probably going to be 500 or 600 pages. Hopefully it will be much less, but that is what we are replacing. Then I expect parliamentary counsel will take some considerable time to draft up a piece of legislation of that significance.”*

Two and a half years, and one election on, the heralded green bill, which was due before the election still has not appeared, and the incumbent Minister’s new proposals do not mention one.

So, is the green bill dead, resting; or maybe it is just pining for the fjords like that Monty Python parrot?

As the previous Minister pointed out, public comment is the norm under green bill processes, and not only has no such consultation taken place on either of these proposals or the report they are based on, but ministerial statements have also ruled out public input on anything other than the implementation of the proposed changes.

That is a serious reversal by the government. And that reversal needs re-reversing because the green bill option is most likely to produce the best results for both lawmakers and the public.

It is important to note that the report underpinning these new proposals was promoted as being an independent review conducted by an “expert” panel, but it was none of those things. It was not a rigorous or open intellectual endeavour seeking the best outcome for the public; it was a secretive process with predetermined outcomes. The previous minister advised:

*“The Panel was established to independently assess and provide recommendations on the feedback collected during the extensive consultation on the direction and requirements for a new Local Government Act.”*

The crucial words to “*independently assess*” are a novel use of the word independent, when that panel:

- Was chosen by minister; and

- had terms of reference from the Minister; and
- had critical matters Ministerially excluded from consideration; and
- reported privately and directly to the Minister; and
- had no independent members of the public on it; and
- had no public input; and
- allowed no public comment on its report; and
- was administered by the department; and
- was advised by the department.

In addition to those characteristics denoting full ministerial control, the Minister reserved the right to vary the terms of reference at any time; retained ultimate authority over the review, reserved final approval and the right to be the public face of it. And if all that doesn't demonstrate a lack of independence, the review was chaired by a first term Government MP who is a WALGA fellow traveller (Hansard P2281 9 Apr 19) and the panel included the departmental CEO as a full member of the panel.

So let us not kid ourselves over the role these allegedly independent “experts” were expected to play; their job was to deliver for the local government club, which they did, and these proposals formalise that outcome.

Please bear in mind this is not about your friendly neighbourhood councillor or shire, it is about a very big law that affects the income and amenity of every family and business in the state. This law and its regulations control a local government sector which imposes taxes worth more than \$4 billion a year, employs over 16,000 people, and manages public assets worth over \$40 billion.

The first and most obvious comment is that these proposals are not a ministerial thought bubble; they are the result of a four-year process and have been endorsed by cabinet. A far more effective process would have been to produce the promised green bill for detailed public consultation. Because without such context it is difficult to assess the implications and efficacy of many of these proposals.

Based on the limited information that has been released, there are some useful initiatives, some not so useful ones, some that will be disastrous if they are ever proceeded with and some that are extremely dangerous.

The overriding concerns are that these proposals do not competently address the sector's structural shortcomings; they dress up some existing powers, they re-validate many of the shortcomings of the LGA and in the main are based on the desires of the local government club.

Most critically, these proposals do not address any of the fundamental issues confronting the sector.

Despite being full of very good people all striving to do the best for their communities, Local Government in Western Australia is:

- Structurally dysfunctional; and
- financially unsound; and
- undemocratic; and



- regulated by a very dated law; and
- overseen by a poorly resourced and under skilled regulator; and
- riven by chronic power imbalances; and
- dominated by a legislated monopoly.

Even if this package is implemented in its entirety, the dysfunction of the sector will not change.

A multitude of royal commissions and formal inquiries have taught us to protect the public interest by creating effective checks, balances, oversight and enforcement measures that are backed by well-resourced authorities with powers to monitor and control public standards and deal with corrupt behaviour and maladministration.

Good public governance requires legislators and regulators to understand that:

- Protecting the public interest should be paramount; and
- those systems reliant on good will, always fail; and
- strong laws with good supporting regulation best protect the public interest; and
- thorough oversight and compliance monitoring with commensurate and independent enforcement are essential for good governance; and
- public officials must be held to account.

But those critical design features do not manifest themselves in these proposals. These proposals reduce oversight, do not address the entrenched power imbalances, do not introduce effective regulatory rigour, and are based on hoping people will always do the right thing.

Those are the design features of public systems that always fail. Successive and learned formal inquiries have provided the evidence to demonstrate that is so. One of the more recent Royal Commissions was into Misconduct in the Banking, Superannuation and Financial Services Industry, where Commissioner Kenneth Hayne said:

*“Misconduct will be deterred only if entities believe that misconduct will be detected, denounced and justly punished.”*

In this State, the Royal Commission into the Commercial Activities of Government, said:

*“The Commission's principal concern is to ensure that public officials and agencies are so regulated as to render them answerable for their actions to the public.”*

There is nothing in these proposals that addresses either of those critical public goals.

Interestingly the paper containing these proposals is headed up “Local Government Reform – Consultation on Proposed Reforms” and it says:

*“Consultation. Comments on these proposed reforms are invited. Comments can be made against each proposed reform in this document. For details on how to make a submission, please visit [www.dlgsc.wa.gov.au/lgactreform](http://www.dlgsc.wa.gov.au/lgactreform).”*

With Nadia Mitsopoulos on 720 ABC Minister Carey said:

*“We are not changing the big ideas, but I am happy to listen to ratepayers and local governments about the delivery.”*

There was a subsequent change that extended the reporting date and the department’s website now carries this advice:

*“The Department of Local Government, Sport and Cultural Industries (DLGSC) is inviting comments from local government and the wider community to inform implementation of the proposed reforms. The feedback received will inform the drafting of the legislation.”*

One can only speculate on why that wording change was necessary; however, it is clear that public input and comment is only for *“implementation of the proposed reforms”*.



*“My last comment ‘appeared’ to be inviting feedback.  
Do not be fooled.”*

This is the old “which leg do you want broken” conundrum that does not allow an answer of “neither”. Government is saying that it will accept comments, but the direction is not changing; so, what if the direction really is wrong and does need changing?



**TOO BAD!**

## THEME #1 - EARLIER INTERVENTION, EFFECTIVE REGULATION AND STRONGER PENALTIES

### ITEM 1.1 EARLY INTERVENTION POWERS

*“A body of men holding themselves accountable to nobody ought not to be trusted by anybody.” Thomas Paine*

This is the area that has been highlighted as the “key change” in the package of proposals; and Minister Carey justified it by saying:

*“The only tool I have had to date, or any minister, is an inquiry; and what do inquiries mean, very expensive, they shut down the organisation, they’re bad for staff, community, businesses. You try get things done while a local government is under an inquiry.”*

Carey on ABC with Nadia Mitropoulos

A check of the act identified about 130 sections of the Act that give ministers/departments powers over local governments. These provisions are in the main, simple, well written clauses that require local governments to report/respond to a minister who is empowered by law to oversee and direct them. This minister is a passionate advocate for a hands-off approach to local government, but his views directly contradict Finding 19 of the Parliamentary Select Committee into Local Government, which said:

*“The LG Act provides the DLGSC and the Minister with a range of powers to regulate the conduct of council members and local government staff, and scrutinise the affairs of local governments. The Committee questions whether the DLGSC is appropriately resourced to exercise these powers and administer its Local Government Compliance Framework.”*

Then the very document being announced by the Minister contains the following in the first line of its very first item:

*“The Act provides the means to regulate the conduct of local government staff and council members and sets out powers to scrutinise the affairs of local government.”*

Then we have the government’s own response to the Select Committee report:

*“Parliament has charged the Minister and the DLGSC with the responsibility for the oversight of local government and the system of local government through the Local Government Act 1995.”*

So, the LGA, his own report and government, and an all-party Parliamentary Committee say a minister has these powers, but he says he does not.

There really cannot be any meaningful argument put forward that a minister for local government has no power over local governments, but another major issue is the cost of policing, monitoring, and overseeing local governments.

Costs have implications for the department, which is a department that has been reconstructed, deconstructed, rationalised, and reordered so many times that it is impossible for it to function coherently.

In its submission to the Select Committee WALGA said:

*“WALGA does not seek to criticise or impugn the commitment and dedication of officers or executives of the Department of Local Government; the issues are systemic and relate to the broader State Government’s commitment to appropriately funding the Department to fulfil its capacity building, regulatory, compliance and early intervention mandate.”*

In their recommendations 19 and 20 the Select Committee said:

*“The Government ensure that the Department of Local Government, Sport and Cultural Industries is sufficiently resourced to be a strong source of advice and support for the local government sector.”*

And

*“The Government ensure that the Department of Local Government, Sport and Cultural Industries is sufficiently resourced to be a strong source of advice and support for individual council members.”*

The government response to those recommendations was:

*“The DLGSC already undertakes a range of proactive support functions and provides sector advice for general matters.*

*The DLGSC has a planned implementation of previous and relevant recommendations from the OAG, as well as recently tabled Review Panel and City of Perth Inquiry reports. This implementation plan will be completed in 2020/21, takes a risk-based approach and includes a review of the current role, structures, resource allocations and Departmental functionality.”*

However, despite those submissions and responses, the government did not address the issues of *“resource allocations and Departmental functionality”*.

On Radio 6PR, presenter Liam Bartlett raised the resourcing of the proposed inspectorate when he talked about how complaints can generate a heavy workload on inspectorates:

*“In which case you will need to resource this inspector more than we resource the auditor general.”*

To which Minister Carey responded, *“You’re right – great question”* and then completely ignored the resourcing issue and did not point out that his proposal shifts the cost of the regulation and governance of this sector onto local governments. While this shift sounds like a radical move, it was one foreseen and officially raised by WALGA in their submission to the act review and the Select Committee, they said:

*“The State Government must not assign legislative responsibilities to Local Governments unless there is provision for resources required to fulfil the responsibilities.”*

But there are no additional resources proposed.

However, the architects of this privatisation/cost shifting exercise, the “expert” panel also ignored the funding shortfalls identified by submissions, but they did address the early intervention process from a different perspective; they recommended:

*“...that there should be an early intervention framework of monitoring to support local governments. The department should have additional powers to appoint and support the monitor with councils responsible for the direct costs of the monitor.”*

While the “experts” recommended the department do the monitoring, they shifted the cost onto local governments, by making them *“responsible for the direct costs of the monitor”*. And on ABC Radio when asked about who pays for this new process, the minister conceded this is a cost recovery model; he said:

*“I am very clear on this; that the council does, but the reason for this is simple. Doing the local government monitor will be cheaper than a full fledged inquiry; and we’ve seen the expense inquiries. So, yes, it is a cost recovery model because the local government is making the request or they are in trouble and they need it, but it is still far cheaper than the inquiry process.”*

Monitoring of local governments is currently the role and function of the under resourced and under skilled government department; they and the minister currently have powers to intervene in local governments begging the crucial question of why doesn’t the Minister and the department simply do what they are charged with doing? But if such a change is needed, do we need retain those parts of the department that no longer carry out these functions?

The minister’s comment regarding the comparison between a formal inquiry and his proposed process is a flawed justification because it is incorrect that the only powers available to the government are inquiry or nothing, but the minister then went on to say:

*“And I think we know the City of Perth cost”*

This is a misleading representation of the cost of government intervention in the affairs of local governments. It was the government that:

- Wrote the terms of reference for the City of Perth inquiry, and
- initiated it, and
- appointed the commissioners, and
- authorised the entire process that ended up costing around \$7 millions.

But having done those things, the government is now changing the system because doing them is now too expensive. Why the government took the path they did is a far better question to ask; the LGA allows for alternatives that were not used.

For example, s 9.13A of the Local Government Act says:

*“If the Minister considers that a local government, a member of a council, a CEO, an employee or an authorised person is contravening a provision of this Act contravention of which is not an offence, the Minister may give the person a notice directing the person to cease contravening that provision.”*

No minister ever used that power in the long running City of Perth saga; why not?

Then there are powers enabling a ministerial direction to the Local Government Advisory Board obligating it to inquire into anything the minister requires, (s 2.45(c)) and there is a plethora of other powers that were also not activated.

The purpose of this section is not to get into the merits or otherwise of the City of Perth inquiry, it is to highlight the farcical nature of using the biggest and most expensive local government inquiry in the State's history as the yardstick for the cost of inquiries generally and then using that inflated cost as the justification for an entirely new system.

So having demonstrated that the cost recovery model came from the "expert" panel, it is useful to then determine the origins of the proposed early intervention model. WALGA in their March 2019 submission on the act review, called:

*"...on the State Government to ensure there is proper resourcing of the Department of Local Government, Sport and Cultural Industries to conduct timely inquiries and interventions when instigated under the provisions of the Local Government Act 1995."*

WALGA called for *"timely inquiries and interventions"* which were to be conducted *"when instigated under the provisions of the Local Government Act 1995"*; which these proposals are not. WALGA further raised the matter with the Select Committee when it said:

*"The sector seeks both a just and timely resolution when intervention is needed. For the Department to provide a timely response it must be properly resourced to avoid unnecessary delay in the intervention process. Undue delay in determining an outcome and corrective action is also an undue delay in returning good governance to the community of an affected Local Government."*

WALGA again raised the necessity of *"properly resourcing"* the department. Departmental resourcing was also formally raised at the Select Committee hearings by the Hon Martin Aldridge who said:

*"Just looking at the 2019–20 Budget Statements, which I am sure you may not have in front of you, but the service summary function in relation to local government is service summary area number 1, "Regulation and Support of Local Government". In 2017–18 it was approaching \$17 million; in 2018–19, the estimated actual was some \$14 million; in this budget year the estimate is \$13 million; and then the forward estimate is tracking down to around \$10 million. On the face of it that is some significant reduction in expenditure in relation to the local government function of the department."*

The current State Budget confirms that fall in revenue from a 2020/21 Estimated Actual amount of \$22.1 millions to \$13.1 millions in 2024/24. The budget also shows the Average cost per local government for regulation and support in 2019/20 was \$108,411; the 2021/22 Budget Target is \$83,000.

These widespread concerns over the department's budget collapse were noted by the Select Committee which said in their report:

*“The Department of Local Government, Sport and Cultural Industries’ (DLGSC) role is to regulate and support the local government sector. The Committee heard that the DLGSC is under-resourced and does not meet the local government sector’s expectations for timely advice, robust capacity building, or early interventions to prevent governance or relationship breakdowns.”*

At point 1.7 the WALGA response to these proposals again draws attention to the funding issue by calling:

*“...on the State Government to ensure there is proper resourcing of the Department of Local Government, Sport and Cultural Industries to conduct timely inquiries and interventions when instigated under the provisions of the Local Government Act 1995.”*

Note that again WALGA is only asking for these interventions to be in accord with the current LGA.

State budgets and various submissions have identified real issues with the resourcing of the department, but these have not been addressed by the government. Which is perplexing because departmental resourcing and cost shifting issues were raised significantly more than early intervention in the submissions and evidence to the Select Committee, which said:

*“The Committee supports the State government’s efforts to improve the DLGSC’s capacity to intervene early to address issues causing dysfunction within a local government. Ideally, this would reduce the high volume of serious breach complaints and authorised inquiries discussed earlier in this chapter.”*

The Select Committee commented on the department’s capacity to intervene early, and this should not be extrapolated to mean support for these proposals’ establishment of an external body or shifting the cost onto local government. Confusingly, the report’s Executive Summary says the committee recommends, *“a policy of early intervention in dysfunctional councils be considered”*; however, no such recommendation appears in their report.

WALGA’s submission to the review proposed a different funding model; it said:

*“Funding of the remedial action should be by the Department where the intervention is mandatory. The Local Government to pay where the assistance is requested.”*

Had that submission been adopted, a council with issues just had to play naughty for long enough to force action from the department which would prevent them from paying. Other than that, only the “expert” panel recommended this cost recovery model of early intervention meaning that all the other submissions that called for the establishment of other regulatory bodies and increased resourcing of the department have been ignored. It is worth noting that there has been no public input into either the “expert” panel’s finding or this proposal.

Cost shifting and funding are critical issues in the local government sector and the continued inadequate resourcing of the regulating department pretty much guarantees that the dysfunction highlighted by the Auditor General’s report will continue until someone has the courage to properly resource this decrepit department.



The question of cost shifting was addressed by the Select Committee which made a finding that:

*“Cost shifting to local governments is a serious issue that deserves Parliament’s ongoing attention”*

But Parliament has paid no attention at all to this “*serious issue*”. So, what does all of this mean for the proposal to:

*“...establish a Chief Inspector of Local Government (the Inspector), supported by an Office of the Local Government Inspector (the Inspectorate)”?*

Because of the paucity of detail, it really is hard to make many scholarly judgements about it, however, the key justification was given on ABC Radio by the Minister as:

*“So, this is the key change, this is about getting in early; it’s a new powerful watchdog which will be able to do investigations with a team of investigators. And it will be able to get any evidence that it requires, in effect it will have the powers of a standing inquiry.”*

Later he went on to say:

*“So that there is <sup>(sic)</sup> no accusations of political interference is a very clear watchdog body that has oversight of all local governments, that can undertake serious investigations with standing powers but there is an early intervention, local government monitors; they’re not punitive but they can go in early. But what I’m trying to do is avoid the inquiries at the end and get in early to fix those problems.”*

The proposal document tells us that this inspector will receive complaints, including against CEOs, have the powers of a standing inquiry (but only where potential issues are identified), have powers to implement penalties and have the power to order compliance. Except for CEO complaints, all these powers currently exist in the LGA and are vested in either, or both of, the minister or the department.

In functioning democracies, we do not grant punitive powers to bodies unless there is an appeal mechanism, oversight, or accountability, but in this proposal, there is no detail on who this Inspector reports to, or even if it reports to anyone. Even the all-powerful and independent, CCC is overseen by a Parliamentary committee, but with this new body there is no indication of how, or even if, any oversight will occur.

*“The Inspector would have powers to implement minor penalties for less serious breaches of the Act, with an appeal mechanism.”*

This is one place where there should be a separation of powers because as it is proposed, this new body will be the policer, investigator, judge, and jury on certain matters. This is unacceptable in a modern democracy and simply saying that there will be an undefined “*appeal mechanism*” does not remove that inbuilt conflict.

The next point says:

*“The Inspector would also have the power to order a local government to address non-compliance with the Act or Regulations.”*

This is a direct lift of the previously mentioned s 9.13A of the LGA which grants this power to the minister. One does not know if that ministerial provision will be retained but if it is not, the effect will be to take legislated power away from a democratically elected minister who is answerable to parliament and transfer it to an unelected bureaucrat. Ministers exercising their powers can be called to account in parliament at any time, however unelected bureaucrats cannot. If the ministerial power is to be retained, this provision is an unnecessary duplication that grants the same authority to two different positions with substantially different ranks. ^^^

A far better option would be for the Inspector’s power to be restricted to advising a minister to use their powers. If the duality of the power is retained, what happens if both bodies use their power on the same issue but order different outcomes? These proposals are silent on these matters and that lack of detail and context making it difficult to assess them.

There were many submissions that showed the local government complaints systems to be complex, difficult, it has been weaponised and there is little in this part that addresses any of those design faults and complexities. On ABC, the Minister said:

*“I will have a panel of experts appointed by the inspector who can go into any local government and assist”*

There is so little information provided about this that there cannot be any genuine assessment or evaluation made of this proposal.

This part manifests itself in the proposal papers as a line entry that can be ignored because all it does is direct readers to the next major Item, 1.2, which is where I will also deal with it. There are then another three points that all direct readers to upcoming items (1.3, 1.4, 1.5 and 1.6) and they will also be dealt with at those stages.

So, in closing this section, and because the powers envisaged for it already exist in the LGA, but are not utilised, it is fair to say that this Inspectorate is a cost shifting, rebadging, and privatising exercise.

The former Director General, Duncan Ord in his evidence to the Select Committee on 3 August 2020 tells us how regulation and oversight are controlled by costs:

*“If we had absolutely extraordinary times, then, of course, through the government budget process, it would be open to me to seek short-term additional resources and deploy those, but at this stage, I am more confident that we can work through the more limited scope of authorised inquiries and then ultimately potentially seek the notion of an authorised officer. An authorised officer potentially, without having to call a full inquiry, could have the powers to seek and perhaps gain some evidence on a relatively simple and limited matter and have it resolved without having to go through the whole process of establishing a report that gets tabled in Parliament and so on.”*

That evidence from Mr Ord confirms these powers already exist and shows that using them is merely a matter of finances.

The genesis of this proposal is probably recommendation 323 of the City of Perth Inquiry (COPI) which says:

*“An office of Inspector of Local Government (Inspector) be established as an independent statutory office, responsible to the Minister for Local Government.”*

How one establishes an office that is required to be both statutorily independent and to also be responsible to a minister is not clear; why one would do it is less clear, however the COPI report continues with recommendation 324:

*“The Inspector have the following duties and functions, namely, to:*

- i) improve the decision-making, integrity, efficiency, effectiveness and accountability of local governments;*
- ii) assume the regulatory and advisory functions of the Department, including any additional functions of the Department arising from these recommendations;*
- iii) assist local governments by providing guidance, education and advice, as requested by local governments, or as the Inspector thinks fit;*
- iv) receive, investigate, assess and mediate complaints or referrals about local government matters, including about council members and employees, including in relation to the Code;*
- v) of his or her own motion, conduct investigations into and audits of local governments, including council members and employees;*
- vi) decide what matters should be investigated or audited, how they should be investigated or audited, what actions should be taken in respect of any investigation, what records or things will be required to be produced, who will be required to be examined under oath or affirmation and who will conduct the examination of any such person in the course of any investigation;*
- vii) inquire into local government matters at the direction of the Minister for Local Government and assume the functions of authorised inquiries under Part 8, Division 1 and the functions of Inquiry Panels under Part 8, Division 2 of the Local Government Act 1995, as appropriate;*
- viii) report to the Minister for Local Government where, in the Inspector’s opinion, a local government may be failing to provide good government, or one or more council members are impeding the ability of the local government to provide good government; and*
- ix) bring legal proceedings against council members and employees for failing to comply with their obligations under the Code.”*

The COPI report has further recommendations<sup>(325 – 331)</sup> which outline the arrangements of such an office and had the Minister’s proposals contained this detail, one could comment on them, but they do not, so one cannot. It is strongly recommended that the Minister withdraw these proposals, rethink the issue, and then, maybe reinstate it in the Green Bill option.

How about a riddle to close this section? How can any of this be justified by Ministers who continue to say that: *“Local governments in Western Australia are autonomous bodies and have the authority to make decisions on behalf of their communities.”*? This Minister is proposing early external intervention in *“autonomous bodies”* with *“authority to make decisions on behalf of their communities”* – Really?

It is obvious that the government ministers do not believe that autonomous nonsense to be true and it really is time they stopped pretending it is so. And if they did stop it, they would also realise that their department already has the powers to do most of what is being proposed by them and if it was properly resourced, reskilled and retrained, it could do all of what is proposed.

#### ITEM 1.2 LOCAL GOVERNMENT MONITORS

The first dot point in this part says: *“A panel of Local Government Monitors would be established”*; one assumes that means that these monitors will be established, but it is hard to know.

These are not individual appointments; the proposal is clearly for a panel, so, will it be a standing panel?

Or will it be an ad-hoc panel?

How many constitutes a panel?

What are the powers of the panel?

What are the powers of individual monitors?

To whom does it report?

We do not know the answer to any of those important questions, but we might know who will appoint these positions because of the second dot point:

*“Monitors could be appointed by the Inspector to go into a local government to try and resolve problems.”*

What does this mean; that they could be appointed by the inspector, or they could be appointed by someone else? If it is not the inspector, then who else would appoint them? We do not know the answer to those questions either.

The third dot point says:

*“The purpose of the Monitors would be to proactively fix problems, rather than to try and resolve problems.”*

A local government is having problems and we are going to establish an entirely new system of an Inspectorate and a panel of monitors with the express purpose to not *“try and resolve problems”*?

Really? What about the previous dot point that says the opposite? It says:

*“Monitors could be appointed by the Inspector to go into a local government to try and resolve problems.”*

Which is it? Will they or won't they *“try and resolve problems”*? If they don't, who will?

It seems it will all be OK because these monitors will also have a purpose to *“proactively fix problems”*. Really? Without trying to resolve problems, these miracle monitors are going to fix problems before they arise?

Thought bubble gobbledegook, methinks!

Because their website tells us, we do know that the department already does these things:

*“The role of the department is to support the local government sector in the provision of good governance and compliance by monitoring, promoting and enforcing compliance with relevant legislation.”*

As that is already the role and function of the department, why do we need new monitors? Conversely, if the departmental role is now to be legislatively transferred to another body, do we need the department? Removing/restructuring the department may be a good thing to do, but these proposals are silent on it so we cannot know. But it does seem absurd to legislate for two bodies with the same powers, the same aims, and objectives to do the same job.

Again, if those claims by successive ministers that local governments are “autonomous” and there are no powers other than inquiries are valid, this and the previous proposal constitutes a significant change in local government in the state. Our constitution does not allow for an autonomous system of local government because s 52 of the Constitution Act 1889 requires:

*“The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.*

*Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.”*

Of course, it is always open to the Government to change the constitution to allow for an autonomous system of local government, but it has not done so, and it is not raised in these proposals. It is also possible for the government to legislate a power of autonomy to local governments, but this is also not raised in these proposals. So maybe the *“increased functional autonomy”* for local governments Minister Omodei referred to in his second reading speech will remain unchanged, but even that is unclear because the Minister Carey on ABC gave some indication of what he is thinking when he said:

*“I will have a panel of experts, appointed by the Inspector, who can go in to any local government and assist. So, let's say you have got toxic relationships, the inspector, he, or she, sends in an inspector, there's financial issues, they send in a financial auditor, there is <sup>(sic)</sup> human resources issues, so we get in early; they will have powers, the monitors will have powers to say, you know, right, stop this meeting, let's talk about this. If it doesn't work and*

*that's the early intervention model, then the Inspector can continue to further investigations, may make recommendations to the conduct panel who can issue penalties.*

*I will still have the ability to call inquiries, but what I am creating here, so there is <sup>(sic)</sup> no accusations of political interference, is a very clear watchdog body that has oversight of all local governments, that can undertake serious investigations with standing powers, but there is an early intervention, local government monitors. There not punitive but they can go in early; what I am trying to do is avoid the inquiries at the end and get in early to fix those problems."*

A team of unelected and unaccountable inspectors with "oversight of all local governments" and unfettered "standing powers" to interfere in the running of a local government's meetings and "undertake serious investigations" is a very scary proposal. It is even scarier when there are no details on the controls, powers or accountability of these people or the Inspectorate.

These proposals give two case studies as examples of how this proposed system will work. The first relates to Financial Management but the example given is a routine departmental issue. The proposal is for nothing more than a transfer of power from the current department to these monitors without any justification, explanation, evaluation or supporting evidence as to why this should occur, or how it will work.

The second case study relates to councillor behaviour and is based on a rather naive view of the world. In this mythical world, once mediation is undertaken by the monitor; all agree, and matters are resolved. In the real world these matters are significantly more complex, and the department know this because it already plays that role. A far more effective way of dealing with this issue would be to have enforceable codes of conduct with appropriate penalties for non-compliance. These would be overseen by a competent and properly resourced department that provided regulatory rigour and capable oversight. Once more the lack of detail makes any serious analysis of these proposals difficult, however the overriding concerns are:

- Most of what is proposed is currently in the LGA; and
- there are no accountability measures proposed; and
- there are no clear lines of authority; and
- the basis of these proposals is flawed; and
- no justification for the change is given; and
- it looks like a departmental reorganisation; and
- it is a privatisation of a regulator; and
- it shifts the entire cost of regulation, monitoring and intervention onto local governments.

There is insufficient information available to allow his proposal to proceed.

### **ITEM 1.3 CONDUCT PANEL**

The first thing to say in this part is that removing the Standards Panel is a good decision.

However, it is not clear the Minister fully understood what that body did, he said:

*"The Standards panel at the moment, that is the body that gives out penalties is local councillors. Local councillors judging local councillors – not on my watch."*

The Standards Panel does not work that way, however if it did, it would be the system of justice incorporating the concept that predates the Magna Carta, i.e., one where you are judged by your peers.

Under the LGA, the Minister (and only the Minister) is required by law to establish a Standards Panel and to appoint one officer of the department, one person with experience as a member of a council and someone with relevant legal knowledge. Whilst it is unlikely all these people will be sitting councillors; it is possible that they may be and from the Minister's comments and proposals it is clear they will not be in future. Why that change is necessary is unknown.

The LGA grants powers to the minister to appoint, WALGA to recommend and entrenches a departmental right to sit on this panel; this proposal appears to remove all those conditions. One suspects that WALGA will fight hard to retain its nominating powers, but it is not clear if any of those rights to nominate will exist under these proposals because all that is proposed is:

*"The Conduct Panel would be comprised of suitably qualified and experienced professionals. Sitting councillors will not be eligible to serve on the Conduct Panel."*

What does "suitably qualified and experienced professionals" mean? And without wanting to start a class war, why only "professionals"? We are a democracy, not a technocracy and it is amazing that any Labor minister would make such a proposal. If this principle applied at a national level John Curtin, Ben Chifley and Paul Keating would never have been Prime Ministers of this country.

And what does suitably "qualified and experienced" mean? We just do not know, but because trade qualified people are not experienced professionals, and small business operators may not be, regardless of their skills or non-professional qualifications, they would be automatically excluded from any role on this new panel.

This proposal only makes provision for the Inspector to provide evidence to the conduct panel. There are no details on what, if any, procedural fairness measures will apply, or how this evidence will be collected, tested, and assessed, all of which make this is another very dangerous proposition.

It is unknown whether this new panel will have powers to hear evidence or investigate claims, or if decisions will continue to be made on documents only. The documents only decision making is widely considered to be a failing, in their report, the Select Committee made several recommendations, but the one of significance to this part is Finding 44:

*"The Local Government Standards Panel does not have the power to compel a person to give evidence, give evidence under oath or produce a document."*

*The Local Government Standards Panel cannot investigate complaints and can only make a decision based on the evidence presented to it."*

While the proposals do not envisage compulsion, oaths, or production of documents, clearly the Select Committee and the COPI inquiry highlighted these design flaws in the Standards Panel. Whilst I prefer the establishment of a Parliamentary Ombudsman to investigate and rule on all local government complaints, others have suggested different options, but one thing that is clear from these submissions is that the Standards Panel is a failed organisation that should

be abolished. It is also clear is that the process of determining a replacement model has not been appropriately considered, and it needs to be.

These proposals continue with one final point in this section:

*“Any person who is subject to a complaint before the Conduct Panel would have the right to address the Conduct Panel before the Panel makes a decision.”*

This statement does not deal with any of the fundamental design flaws of the proposed Conduct Panel’s processes; there is no suggestion of evidence being tested, there are no hearing processes proposed and there is no indication of any procedural fairness.

Given that lack of detail and the fundamental design flaws, why would this proposal be proceeded with? I strongly recommend that it not be proceeded with, and that the government restart this process in an endeavour to produce a competent, fair, and practical complaints process that is incapable of being weaponised.

#### ITEM 1.4 REVIEW OF PENALTIES

Because there is little value in spending time on penalties unless and until we know what the system of defining, trying, and determining offences is to be, there is no point spending much time on this section. The paucity of detail also restricts sensible comment. e.g. How does one comment intelligently on a statement that: *“Penalties for breaching the Local Government Act are proposed to be strengthened.”*?

What is missing in this part is detail on the creation of general offences for breaches of the LGA, its regulations, codes, and other relevant laws. If that is done properly and combined with a redesigned and simple but effective complaints system, the culture, regulation, and governance in the sector will be significantly improved.

WALGA’s consultation document on these reforms at this part introduces a new offense which is when an elected member’s “continued presence prevents Council from properly discharging its functions or AFFECTS THE COUNCIL’S REPUTATION.” (my emphasis)

This is a dramatic change for local government because the current LGA s 2.10 (a) requires councillors to represent *“the interests of electors, ratepayers and residents of the district”*. The LGA places no obligation on elected members to represent the interests or reputation of the local government. Sometimes to represent the public interest the reputation of an organisation can be deleteriously affected.

It is clear in corporate law that the responsibilities of the company and the directors are delineated and distinct, but in local government, there is no such clear distinction made. The Local Government Act is silent on the responsibilities of councillors, and that is not how it should be; I urge the reviewers to re-examine this issue with a view to including such provisions in the new act.

For example, should councillors who breach/ignore laws, regulations and processes become personally liable for their actions in the same way directors are?



Or should individual councillors continue to act with impunity from the effects of their decisions?

When the screen of collective council responsibility remains impervious to external examination, how can ratepayers be assured that each individual councillor is performing well?

The provisions of S184 of the Corporations Act 2001 relate to offences by directors and officers of corporations and they are enlightening. These provisions create criminal offences if office holders are reckless, intentionally dishonest, fail to exercise their powers and discharge their duties in good faith in the best interests of the company or for a proper purpose. It is more than appropriate for similar provisions to be developed and inserted into the Local Government Act.

One of the tools used to prevent individual councillors speaking out and exposing maladministration are the adverse reflection provisions and the WALGA proposal to create a new offence compound this issue.

This vexed issue was supposedly cleared up in the ministerial answer to a parliamentary question from the now Minister on 12 Oct 16:

*“The mayor or shire presidents are the spokespersons for the local authority. They are an independent authority in their own right. Councillors do, however, have a right to go out there and champion local causes, speak in their local papers, or even go onto their local networks, radio or otherwise, to talk about issues around the broader area.”*

While that statement makes it clear that an individual councillor has the right to express their view, this is a position that WALGA has never accepted, they issued a contradictory media release on 14 Feb 19, that said:

*“... in recent times there had been some criticism of the public comment parameters for Elected Members – in particular the requirement on detrimental comments. Such criticism has claimed that the requirements restrict democracy where the opposite is actually the case,” Cr Craigie said. “Elected Members have the opportunity during the debate at Council to express their views either in support or in opposition to a position. Once that decision is made however, there needs to then be respect for the democratic process and to abide by the majority decision. Any individual who wants to ignore a majority decision that they don’t agree with and then continue the debate in public is actually trying to set themselves above the democratic process.”*

Being able to call decisions of the body into question is a fundamental democratic right that is absent in local government in this state. There are ways that allow questioning without being derogatory or offensive and in the event that a councillor’s public statements do offend the standards there should be civilized processes to deal with that. But those processes should not interfere with elected members’ right to open and democratic public debate on issues.

The second leg of the WALGA submission on these proposals is equally as flawed as the previous one; they are advocating:

*“That activities associated with the term of “disruptive behaviour” presented to stand down a defined Elected Member on the basis their continued presence may make a Council*

*unworkable, are thoroughly examined and clearly identified to ensure there is awareness, consistency and opportunity for avoidance,”*

It is enough to say that, if implemented, this proposal would allow the expulsion of an elected member if “...*their continued presence MAY make a Council unworkable...*”<sup>(My emphasis)</sup> That bizarre proposal completely reverses the onus of proof and allows someone (and it is not clear who) to take punitive action against an elected member for the sole reason that something may happen.

#### **ITEM 1.5 RAPID RED CARD RESOLUTIONS**

The earlier comments regarding the WALGA submission apply to this part also.

Presiding members will love this, but it simply rebadges some existing powers and creates a new one. At best it is a stunt that diverts public attention away from serious issues and at worst it is a serious challenge to democracy. Ejecting an elected member from their position is rarely justified and to empower a presiding member with unilateral powers to eject or remove an elected representative’s right to debate is unconscionable.

Debates get heated, angry at times and sometimes people just behave badly, and in local government the person charged with dealing with this is the presiding member who should be first among equals and have the confidence of their peers. That confidence is not often unanimous but unless it exists, the system will just not work, red cards notwithstanding.

The mandatory code of conduct defines the standards required from those elected; albeit with no penalties and, depending on the standing orders of each local government, presiding members already have considerable powers. Most standing orders already allow for the process envisaged by this proposal but stop short of giving presiding members powers to eject. Compare these two provisions, the first is the “new” proposal and the second is the City of Perth Local Law:

*“This power would:*

- *Require the Presiding Member to issue a clear first warning*
- *If the disruptions continue, the Presiding Member will have the power to “red card” that person, who must be silent for the rest of the meeting.*
- *A councillor issued with a red card will still vote, but must not speak or move motions*
- *If the person continues to be disruptive, the Presiding Member can instruct that they leave the meeting”*

And

*“If a member –*

- (a) persists in any conduct that the Presiding Member had ruled is out of order; or*
- (b) fails or refuses to comply with a direction from the Presiding Member,*

*The Presiding Member may direct the member to refrain from taking any further part in debate on that item, other than by voting, and the member must comply with that direction.”*

The difference between those two provisions is that the new proposals grant the presiding member a power to instruct that an offending councillor leave the meeting. Such an unconscionable power can change the outcome of close votes by using a combination of this red card and the presiding member’s casting vote.

Presiding members using these powers are to report it to the new inspector who will have the power to impose a penalty, but what is not clear is:

- On whom penalties can be applied; and
- what any penalties may be; and
- whether any penalties can be appealed; and
- whether a council can object to or reverse a red card decision and if so, how do they do that?
- Whether there are any appeals against any of the decisions made in this process, and
- what does the inspector do, if anything, after receiving notification, and
- are the matters dealt with while a councillor is red carded ever revisited if the red card is found to be unjustified or imposed wrongly, and
- in tightly contested votes, what happens if a presiding member ejects a vocal councillor, and the controversial item is passed using the powers granted under s5.21(3) of the LGA; is the matter ever revisited? And if so, how?

This is not a sin bin proposal where an offending councillor is ordered out for a period, this is an expulsion that must be weighed up against the current power to adjourn the meeting for fifteen minutes and my preference is for the latter.

This proposal should not be proceeded with.

#### **ITEM 1.6 VEXATIOUS COMPLAINT REFERRALS**

One struggles to see how this proposal conforms to the current LGA <sup>(s 1.3 (2)(b)(c))</sup> which is intended to result in “*greater community participation in the decisions and affairs of local governments*”; and “*greater accountability of local governments to their communities.*” But if this proposal is to be proceeded with, one assumes those provisions in the LGA will be deleted.

This proposal originated with WALGA, who in their 20 March 19 Local Government Act Review Submission said, inter alia:

*“That a statutory provision be developed, permitting a Local Government to:*

*Enable Local Government discretion to refuse to further respond to a complainant where the CEO is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith, or has been determined to have been previously properly investigated and concluded, similar to the terms of section 18 of the Parliamentary Commissioner Act 1971.”*

WALGA's proposal means that a citizen seeking legitimate information that is not forthcoming can be referred to the inspectorate which is empowered to make an "assessment of the facts" and declare a querulous citizen vexatious. What that means is not disclosed and there is no appeal outlined. It is also unknown what the process the inspectorate will follow to assess the facts, nor is it known who will provide those facts and the period and ambit of any declaration is also unknown.

This is a recipe for officials to delay, frustrate, or obfuscate for long enough to enable them to seek to have querulous constituents declared vexatious.

By way of example, it took two years of routinely questioning the processes, policies, and procedures of a local authority to have \$550,000 of shire expenditure publicly confirmed. This process annoyed office holders who took great umbrage at being publicly questioned. Council officers sought to remove question time, limit questions, edit Facebook posts of staff and councillors and sue the local newspaper, all of which failed. That questioning resulted in adverse findings from a formal inquiry into that local government. If this proposed power had existed at that time, those being questioned would have had the questioners declared vexatious.

Just a reminder here that we have precious little detail on the role and responsibilities of the Inspector, and we have highlighted the fundamental flaw of this position being the policer, investigator, judge, and jury.

There are no details on how facts will be determined, who will present them to the inspector or what the effect of any ruling may be, as there are no details of what appeal processes there may or may not be. The justification for this change is given as:

*"Unfortunately, local government resources can become unreasonably diverted when a person makes repeated vexatious queries, especially after a local government has already provided a substantial response to the person's query."*

The unreasonable use of local government resources answer is the default local government justification for not answering questions and it is regularly used to oppose FOI applications.

The WALGA response to these proposals contains another retributive suggestion that:

*"Enabling an agency to recover reasonable costs incurred through the processing of a Freedom of Information access application where the application is subsequently withdrawn;"*

This WALGA proposal again highlights how little the sector understands the principles that underpin the freedom of information processes. The FOI Act sets the relevant fees and charges and allows agencies to recover fair costs from applicants, however those costs are defined by legislation and regulation. There are many reasons why an FOI application may be withdrawn, and the WA FOI Act makes no provision for charges other than those prescribed in it.

The WA FOI Act makes no allowance for vexatious complainants so to use the Queensland act as the justification for imposing these provisions under the LGA is not an acceptable way of dealing with these matters. It is again worth drawing on the Information Commissioner's [office knowledge base](#) which advises:

*“One of the most effective things agencies can do to achieve the objects of the Act is to disclose information outside the FOI process unless there is a good reason not to do so. This can be done by proactively publishing information, or by providing requested information without the need for a formal FOI application.”*

I reiterate that these proposals from WALGA demonstrate a very poor understanding of the rule of law, the legitimacy of public involvement in local government, the FOI system and the public’s right to know.

Returning to the government proposal, it is contrary to the provisions of the current LGA, is not in the public interest and should not be proceeded with.

#### **ITEM 1.7 MINOR OTHER REFORMS**

The first dot point is meaningless gibberish.

The second dot point is redundant because the power to issue guidelines, regulate, and advise already exists, as is demonstrated by the Select Committee’s recommendation 18:

*“Where appropriate, the Department of Local Government, Sport and Cultural Industries review and update its published guidance to the local government sector.”*

And the official Government response was:

*“The DLGSC will be reviewing (2020/21) and considering options to consolidate and update existing local government guidance material. The review will include the local government guidelines, content on the DLGSC’s website, as well as the local government accounting manual.”*

As the official government advice is that the matter is already underway, one can only wonder why “one option being considered is the potential use of sector-wide guidance notices” is being considered a reform, minor or otherwise.

The third dot point was dealt with earlier in Item 1.1

#### **THEME #2 – REDUCING RED TAPE, INCREASING CONSISTENCY AND SIMPLICITY**

*“A bureaucracy expands to keep up with the needs of an expanding bureaucracy.” Isaac Asimov*

#### **ITEM 2.1 RESOURCE SHARING**

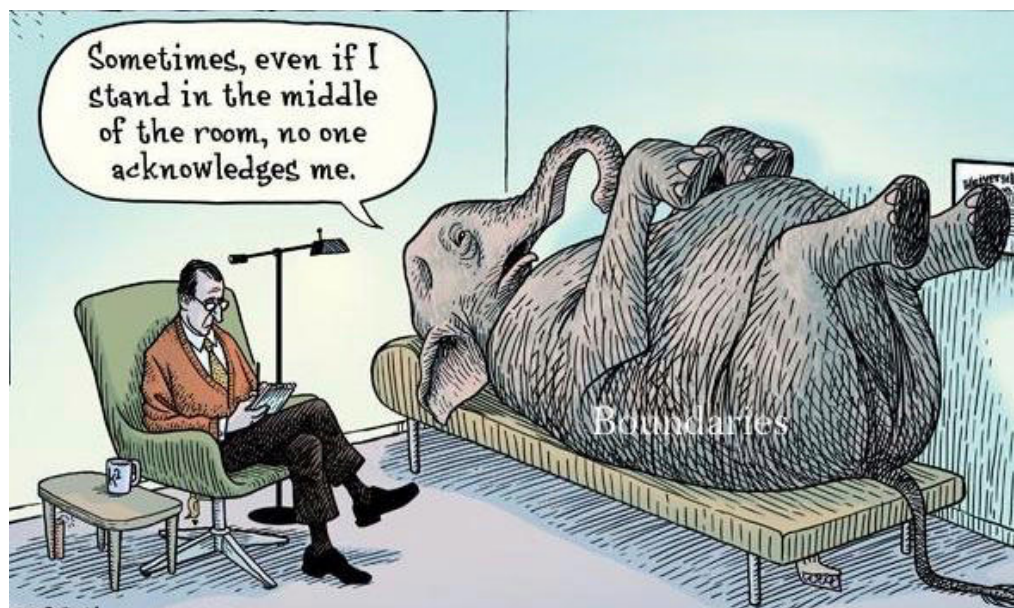
While there is some logic to such a change and I am not opposed to it per se, it is largely included as a means of avoiding boundary changes and amalgamations, a subject that, despite being dealt with comprehensively by various submissions to this review process, has been ignored by the government.

The opposition to amalgamations (forced or otherwise) is based on self-interest and political cowardice. If local government did not exist and someone presented the current boundaries as

the permanent basis for a new level of government to be created in the State; they would, quite properly, be laughed out of the room for making such an illogical and inane proposal.

The defence used by the Minister is that the previous government's efforts in this area were a disaster, and I agree with him, but by ignoring this critical issue his government is doing no better than their predecessors.

Local Government in WA is structurally unsound and until that major issue is addressed, reforms of this kind should not be proceeded with because they validate and support the dysfunction, entrench high costs and work against the interests of communities.



WALGA's response to these proposals continues to advocate for beneficial enterprises which is dealt with elsewhere in this paper.

## **ITEM 2.2 STANDARDISATION OF CROSSOVERS**

This is a priority local government act reform? Really? It is at best a regulatory matter and its inclusion in this process is a mistake.

## **ITEM 2.3 INTRODUCE INNOVATION PROVISIONS**

There may well be some substance to the first dot point that:

*"New provisions are proposed to allow exemptions from certain requirements of the Local Government Act 1995, for:*

- *Short-term trials and pilot projects"*

However, this is a statement of intent, and the lack of justification and detail makes it impossible to contribute anything meaningful to any discussion about it. The second dot point proposes exemptions under the LGA for:

*"Urgent responses to emergencies."*



This should not be proceeded with unless and until the consequences of any amendments are tested against the provisions of the Emergency Management Act 2005. There should be no amendments made to the LGA that would override, amend, alter, or even influence or confound the powers under the Emergency Management Act.

This part may well be little more than a knee jerk response to the Bruce Rock Shire's issues that arose from their recent supermarket fire.

#### ITEM 2.4 STREAMLINE LOCAL LAWS

No-one has any idea what an appropriate period is for reviewing local laws. Proficient legislators constantly review, and modernise their statutes meaning that for them, mandatory review processes based on some arbitrary time would not be required; the issue only arises with substandard legislators.

To accommodate good governance, proper regulation and oversight the new LGA should empower the regulating department (which has the formal system of oversight and monitoring) to require local governments to pass, amend, review, and report their local laws. The subsequent regulations should require routine reporting to the regulator and prescribe consequences for non-compliance.

The next dot point requires reduced advertising requirements for model local laws - why? Again, there is no justification, and this matter looks like someone's pet hobby horse issue.

s 3.9 of the LGA gives local governments the power to adopt and amend model laws, it says:

*“The Governor may cause to be prepared and published in the Gazette model local laws the provisions of which a local law made under this Act may adopt by reference, with or without modifications.”*

There is no need to complicate regulatory standards in this regard, it is unacceptable legislative micromanagement. However, one issue that is not addressed in these reform proposals is WALGA operating a model law drafting service; it is not clear if local governments are charged for this service, but if they are they should not be. Drafting model laws has traditionally been the role of the department and lawmaking is a core function of government that should never be privatised.

Disturbingly a search through the government gazettes shows that WALGA is responsible for 14 model local laws which appears to contradict s 3.9 of the LGA. Unless the department has examined these and provided official advice to the Governor, WALGA's model laws breach the LGA.

The WALGA response to this proposal is frightening. WALGA's proposal is to:

*“Introduce certification of local laws by a legal practitioner in place of scrutiny by Parliament's Delegated Legislation Committee.”*

The WA Constitution Act 1889 (s 52, 53) make it obligatory that Parliament is responsible for maintaining our system of local governing bodies and granting powers to local governing bodies. Those provisions prohibit what WALGA is proposing but even if they did not it would

be high level corruption if legislative oversight was removed from a Joint House Standing Committee and transferred to a fee for service legal practitioner.

What WALGA proposes is also a contempt of Parliament because the Standing Orders mandate that it is a function of that committee to inquire into and report on:

*“(a) any proposed or existing template, pro forma or model local law;”*

The WALGA proposals demonstrate an alarming lack of understanding of our system of government and should be rejected out of hand. Any new review proposals should make it clear that drafting model laws is the sole responsibility of the regulating department and the oversight is a parliamentary responsibility.

#### **ITEM 2.5 SIMPLIFYING APPROVALS FOR SMALL BUSINESS AND COMMUNITY EVENTS**

This is not a matter that requires legislation, it is at best a regulatory matter if it is even that.

It is also deliciously ironic that this proposal demonstrates that ministers who regularly tell us that *“Local governments in Western Australia are autonomous bodies and have the authority to make decisions on behalf of their communities.”* do not even believe it themselves.

#### **ITEM 2.6 STANDARDISING MEETING PROCEDURES**

Why? There is nothing more that needs saying on this until that question is answered.



#### **ITEM 2.7 REGIONAL SUBSIDIARIES**

This proposal is yet another of the many mechanisms aimed at avoiding dealing with the entrenched structural dysfunction of local government in this state.

In one of its more duplicitous tactics, the “expert” panel rejected WALGA’s submission to form *“Beneficial Enterprises”*, then the proposal was renamed, redesigned, and recommended.

Those recommendations were:

*“Recommendation 41.*



*The Panel recommends that ‘beneficial enterprises’ not be introduced as a new mechanism for local government commercial activities, but that instead an updated and more flexible subsidiary model should provide for the following:*

1. *Local government autonomy to establish a single or joint subsidiary to:*
  1. (i) *Carry out any scheme, work or undertaking on behalf of the council;*
  2. (ii) *Manage or administer any property or facilities on behalf of the council;*
  3. (iii) *Provide facilities or services on behalf of the council; and/or*
  4. (iv) *Carry out any other functions on behalf of the council.*
2. *The subsidiary to be established through a charter.*
3. *The charter to be certified by an independent and suitably experienced legal practitioner as within power and National Competition Policy.*
4. *Public notice of the proposal to establish the subsidiary to ensure that there are no private operators that would be significantly disadvantaged.*
5. *The subsidiary to be able to undertake commercial activities (within the limits of competitive neutrality and a thorough risk assessment).*
6. *The subsidiary to have the ability to acquire, hold, dispose of or otherwise deal with property.*
7. *Dividends able to be paid to member local governments.*
8. *The requirement for employees of the subsidiary to be employed under the same award or agreement conditions as the relevant local government/s and within the jurisdiction of the Western Australian Industrial Relations Commission.*
9. *No requirement for ministerial approval at the outset, but reserve powers for the Minister for Local Government to intervene if issues arise should be included.*

*Recommendation 42.*

*The Panel recommends local governments should utilise the subsidiary models and, as a general rule, should not form entities outside this, such as under the Associations Incorporation Act, except as a means of establishing or maintaining partnerships with other local or regional organisations in those instances where the local government is not the dominant party.”*

Amazingly, if implemented, the elected body charged under the LGA:

- a. *To govern the local government’s affairs, is removed from governing; and*
- b. *to be responsible for the performance of the local government’s functions, is removed from that role; and*
- c. *to oversee the allocation of the local government’s finances and resources, is excluded from doing so.*

After discussing the matter in detail, the Select Committee said:

*“Considerable further work needs to be done to assess the potential risks and benefits of the beneficial enterprise model.”*

When current regional subsidiaries provisions were inserted in the LGA, the second reading speech of the Minister of the day, Tony Simpson MLA, said:

*“A regional subsidiary will not be able to make local laws or enter or commence a commercial enterprise as these are legislative and executive functions of a local government under part 3 of the Local Government Act 1995. The model will be useful, however, as a mechanism for local governments to collaborate on such activities as the management of information technology, regional tourism or service delivery to Aboriginal communities.”*

Having ruled out any of the “legislative and executive functions of a local government under part 3 of the Local Government Act 1995”, which is headed “Functions of Local Governments” the Minister then proceeded to outline how this new process would shortcut the transparency and accountability requirements of the LGA. He said:

*“The proposed new regional subsidiary model will provide increased flexibility for local governments in providing shared services to their communities without the significant regulatory and compliance burden of the existing models.”*

Another consideration that confounds deliberation on this issue is whether a local government even has the power to form such a body. s 52(2) of the Constitution Act 1889 says:

*“Each elected local governing body shall have such powers as the Legislature may from time to time provide being such powers as the Legislature considers necessary for the better government of the area in respect of which the body is constituted.”*

Simply creating regional subsidiaries does not acquit the constitutional requirement for an elected “local governing body” to only have powers in the “area in respect of which the body is constituted”. Unless it is clearly demonstrated that a regional subsidiary delivers “better government” to the local government area such a proposal does not conform. It is of course open to government to change the constitution to allow for that to happen, but that has not been raised as an option thus far.

Once again WALGA’s response to these proposals gives cause for concern, and what they suggest flies in the face of every royal commission and formal inquiry that has looked at the use of public funds. WALGA highlight that:

*“A key advantage of the regional subsidiary model is the use of a charter, as opposed to legislation, as the primary governance and regulatory instrument.”*

That remarkable statement flies in the face of the rule of law and directly contradicts the WA Royal Commission into the Commercial Affairs of Government, which said:

*“Members of statutory authorities with very significant funds subject to their control seemed to be unaware of, or else indifferent to, their legal and public duties.”*

And

*“The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.”*

Whilst it is not uncommon for groups to lobby government for changes to make their lives easier, it is rare to see a peak body advocating for a system to operate outside the law. What WALGA is proposing is a system that has the minimum of oversight, transparency, and

accountability, and when one is using public monies that is the direct opposite of what is required.

These proposed changes to the way that local governments operate and account for public funds is defective and should not be proceeded with. But even if it is still to be considered, and I submit that it should not be, the WALGA option cannot be proceeded with because it is unconstitutional, unaccountable, unethical and prepares the ground for endemic corruption.

### **THEME #3 – GREATER TRANSPARENCY & ACCOUNTABILITY**

*“It was accountability that Nixon feared.” Bob Woodward*

#### **ITEM 3.1 RECORDING AND LIVE STREAMING OF ALL COUNCIL MEETINGS**

Except for the requirement that it only apply to Band 1 and 2 local governments, this is a good proposal. The blanket exclusion of local governments in bands lower than 1 and 2 excludes Bassendean, Claremont, Cottesloe, East Fremantle, Mosman Park, Peppermint Grove, and most country local governments. What possible justification could there be for not requiring these bodies to broadcast, live stream and retain their meeting’s records as official records?

There is no logistical, technical, financial, or ethical reason why any local government should be excluded, but if specific circumstances do arise, provision should be made to ministerial discretion to allow a local government to apply for an exclusion. The final decision should be a ministerial one that is based on public advertisement and comment prior to it being made.

By virtue of s 5.25 of the current LGA, this process requires no legislative change, and it is a matter that can already be regulated by the department.

#### **ITEM 3.2 RECORDING ALL VOTES IN COUNCIL MEETINGS**

This is a good proposal that only needs to be in regulations, it is not a legislative matter.

#### **ITEM 3.3 CLEARER GUIDANCE FOR MEETING ITEMS THAT MAY BE CONFIDENTIAL**

Contention in this area stems from an unpreparedness of the local government sector to comprehend that the Freedom of Information Act (1992) (FOI Act) reversed the previous regulated settings for public access to information. Prior to the FOI Act, the general setting was that everything governments did was not public unless the government agreed to release it. For local government, the LGA prescribed some information that had to be released to the public and everything else was deemed private.

The FOI Act reversed that principle by creating a general right of access to information; in effect this meant that unless there was a specific reason (and these are legislated) for not releasing information it should be released. The passage of the FOI Act required the insertion of s 5.97 in the LGA that says:

*“Nothing in this Division affects the operation of the Freedom of Information Act 1992”*

But even with that specific clause, the concept of the public accessing information remains controversial in the sector. Withholding information is usually motivated by desires to cover

up or conceal wrongdoings by public office holders, which is a matter that has been ruled on by the High Court:

*“It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice in that information is that it enables the public to discuss, review and criticise government action.”*

Commonwealth V Fairfax (1980) 32 ALR 485

That message has yet to reach the local government sector.

For this process it is worth noting s3 of the FOI Act specifically mentions local government, legislates the general right of access, and makes it clear that there is nothing in the FOI Act to prevent the release of information. Those three critical messages have yet to reach the local government sector, which was noted by the Information Commissioner in her submission to the Select Committee:

*“Greater recognition for the pro-disclosure objects and operation of the FOI Act and the role of the OIC in encouraging local government agencies to give access to as much documentation outside the FOI Act as possible and to use the FOI process as a last resort for those seeking access to government documents”*

This proposal to prescribe confidential items in the LGA is a return to the bad old prescriptive days and is the direct opposite of the requirements of the FOI Act and the direction proposed by the Information Commissioner.

As such it should not be proceeded with.

Again the WALGA response to these proposals signposts their desire for less oversight and accountability, they query the proposed requirement to provide the regulating department with audio recordings of all proceedings of confidential items. WALGA says:

*“While being supported, the requirement to provide audio recordings of confidential matters to the DLGSC is queried on the basis that written and audio records can be readily accessed from a Local Government if required.”*

Clearly WALGA did not notice s 1.1 of these proposals which starts with this statement:

*“The Act provides the means to regulate the conduct of local government staff and council members and sets out powers to scrutinise the affairs of local government.”*

What WALGA is querying is the right of the regulating department to systemically oversee local government and not just investigate individual matters. It is quite proper and appropriate that the government proposal that these matters are routinely forwarded to the regulating department be introduced and complied with. One would expect that, on receipt of the audio records, the regulator would check to verify that all rules, laws and guidelines were complied with by the local governing body.

Such scrutiny is one of the checks and balances of the systemic oversight that our system depends on.



#### **ITEM 3.4 ADDITIONAL ONLINE REGISTERS**

This is a useful reporting requirement that is at best a regulatory matter.

However, what is not clear is the retention of existing reporting provisions for staff; if these are to be retained there is a need to make it clear this new provision applies to disclosures by staff, including CEO's. The part of this section that refers to the interest's disclosure register only mentions elected members, so one can assume that employees, including CEOs, are excluded.

Which is curious because it indicates a weakening of the current provisions (s 5.71) which obligate anyone making decisions under delegated authority to disclose. Those provisions need modernisation because the reporting level is lower than that applicable to an elected member. Any new provisions should make it clear that those using delegated powers should accrue publicly reportable disclosure obligations in the same way as elected members.

WALGA has again used this process to seek to have CEO contracts excluded from disclosure which is dealt with elsewhere in this paper.

### ITEM 3.5 CEO KPI PUBLICATION

The first dot point does not seem to set the bar very high if we are only striving for “*minimum transparency*” by requiring the publication of these KPI’s. My view is that we should be striving for maximum transparency and requiring full public access to CEO contracts.

Until last year, the LGA required local government CEO contracts to be provided to the public, CEOs hated it, but the public loved it. Responding to the power of the local government club, the former Minister surreptitiously had Parliament remove that provision <sup>(s 5.94)</sup> from the LGA. This deletion has been interpreted as meaning that these documents are no longer available to the public, but that is not what the minister said at the time, the explanatory memorandum to the Local Government Amendment Bill 2019 says:

*“Subsection (f) removes the requirement to have the CEO’s contract available for inspection. This is being replaced by a requirement (to be set in regulations) for the CEO’s total remuneration package to be published.”*

That removal is not mentioned in the Minister’s second reading speech. However, in its third paragraph, the second reading speech does set the context within which this matter should be considered, the Minister said:

*“The reforms in this bill aim to deliver on the principles of governance, transparency and accountability. The bill introduces measures to ensure universal training, a mandatory code of conduct, chief executive officer employment and performance management standards, a revised gifts framework, and improved reporting to the community.”*

(Hansard 14 Mar 19 p1310)

The importance of the second reading speech in interpreting this legislative change is relevant because s 19(2)(f) of the Interpretation Act 1984 outlines the “*...the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law...*” to include at (f):

*“...the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House.”*

Clearly, the Minister did not mention making contracts secret in his crucial second reading speech; accordingly, no such intention can be attributed to him. If the Parliament desired to make contracts secret, the second reading speech is where such an intent would be revealed; but that did not happen, with the result is that the Act is now silent on these matters. However, the Minister’s second reading speech indicated his intentions when he advocated the legislative changes deliver the “*...principles of governance, transparency and accountability...*”

The heading of Greater Transparency and Accountability in these proposals might just be the place to propose greater transparency and accountability by way of reinstating the public release of CEO contracts in line with these “*principles of governance, transparency and accountability*”.

It is strongly recommended that the Minister legislate the public release of CEO contracts in their entirety.

In their response to these proposals WALGA said (inter alia):

*“It is worth investigating whether the proposed reforms considered whether this factor could impact on the recruitment of CEO’s, particularly from outside the Local Government sector.”*

For decades local government had no problem recruiting CEOs. Those seeking employment as a CEO understood that their contracts were to be public documents, it is conceded that they did not like it, but as it was known about prior to applying for the job, these people were able to make informed decisions on whether to work in that capacity or not.

The same can be said for these proposals, there is no compulsion to apply for a job as a CEO. They are all volunteers, their remuneration is reported publicly and set by the Salaries and Allowances Tribunal and still there is no shortage of hopeful CEOs.

The WALGA response is a red herring that should be ignored.

#### **THEME #4 – STRONGER LOCAL DEMOCRACY AND COMMUNITY ENGAGEMENT**

*“However beautiful the strategy, you should occasionally look at the results.”* Winston S. Churchill

##### **ITEM 4.1 COMMUNITY AND STAKEHOLDER ENGAGEMENT CHARTERS**

This part is about introducing requirement for a local government to prepare a non-enforceable and unpoliced charter.

There are no recommendations on content, implementation, compliance, or competence, nor are any other matters of significance proposed.

There are no proposals for any requirement for a local government to do anything post preparation, and once they have prepared the required charter, their responsibilities under this proposal are acquitted.

##### **ITEM 4.2 RATEPAYER SATISFACTION SURVEYS**

Because the principal argument is identical for this item, please see Item 4.1 above.

These satisfaction surveys are a proven failure in the sector, and these proposals are legislative micromanagement.

If regulators find them useful and deem such a survey necessary, it should be a matter of regulation, oversight, compliance, and competent reporting to the department/minister and not a matter of law.



#### ITEM 4.3 INTRODUCTION OF PREFERENTIAL VOTING

Changes to the law have forced the local government sector to flip between First Past the Post (FPP) and Preferential Voting (PV) for decades.

Usually Labor governments tend to opt for PV and the Lib/Nats FPP. The local government club prefers FPP, but both options result in bad outcomes and overlook the literally thousands of other voting systems that exist. My verbal evidence to the Select Committee said:

*“The argument about preferential voting in local government has been put in the black-and-white world, and you can read back over 30 years of discussion about it. It is put in the black-and-white world. The only two options are first-past-the-post voting or exhaustive preferential voting. I mentioned earlier that in my previous life I have used the exhaustive preferential voting system to do what it is designed to do, and that is to allow people to cobble together votes so that you can knock off someone you want out of office. That is what that system is designed to do. It is a terrible system, even though I used it. The only system that is worse than that is the first-past-the-post system. I will give you this simple analogy: 10 candidates running in an election and 100 voters; eight of the 10 get 10 votes each, one gets 11 and one gets nine. The person whom 89 per cent of the voters voted against wins. That is not correct. There are literally millions of processes in between those two, and the one I prefer is optional preferential voting. That is where, using the same 10 candidates, if you know only three of them you only have to vote for three. You get 10 votes and you only have to vote for three. The other seven votes are not cast. It is a system that overcomes preference whispering and allows the public to express its will freely, and it is a system that is more likely to deliver a popular result than any of the others that are on the table.”*

Optional preferential voting deals with most of the controversial election issues, but unless we get locked into the age old two option process (which it seems we are to be), I am not dogmatic about which of the many systems we should adopt. However, the “expert” panel recommended:

*“Optional preferential voting be adopted in place of the current first past the post system”*

This minister disagreed with that recommendation by saying we will get full preferential voting. Speaking about preferential voting on the ABC the minister said:

*“We should have a system that is aligned with our state and federal. Preferential voting is the way of voting for the Australian culture; every other state does it, we should be aligned with our federal and state governments”*

Who could argue with a very sound proposition that because all states and the federal system use a particular system, we should also use it? Well, this minister can, because when it comes to compulsory voting he says the opposite:

*“We have 139 local governments, election cycles over every two years. The burden, the cost to ratepayers would be extraordinary, you would need more election booths. If there were less councils perhaps.”*

Aside from not noticing that most councils use the WAEC and a postal voting system, there was no mention by the minister that state and federal systems also have compulsory voting,



instead he highlighted the cost to ratepayers of elections. On an ABC Radio Forum on local government, the Mayor of Swan said:

*"I am a big fan of compulsory voting; one of the things that gets me is the huge cost of local governments running elections. We know at Swan that we are probably pushing half a million to get 98,0002 ballot papers out, to be precise, to get at the moment a very, very low return. At the moment probably pushing 22%. And I know Mark will probably tell us that Stirling is way north of that probably pushing 700; so, there is two local governments with \$1.5 million, give or take; just to run an election. So, to get such a low return we are talking \$18 a ballot paper, that to me is absurd. But to go compulsory brings it down to around \$3."*

Compulsory voting reduces the cost per vote from \$18 per vote for non-compulsory ballots to around \$3 per vote for a compulsory system; but according to the Minister, we cannot have it because of the extraordinary cost to ratepayers?

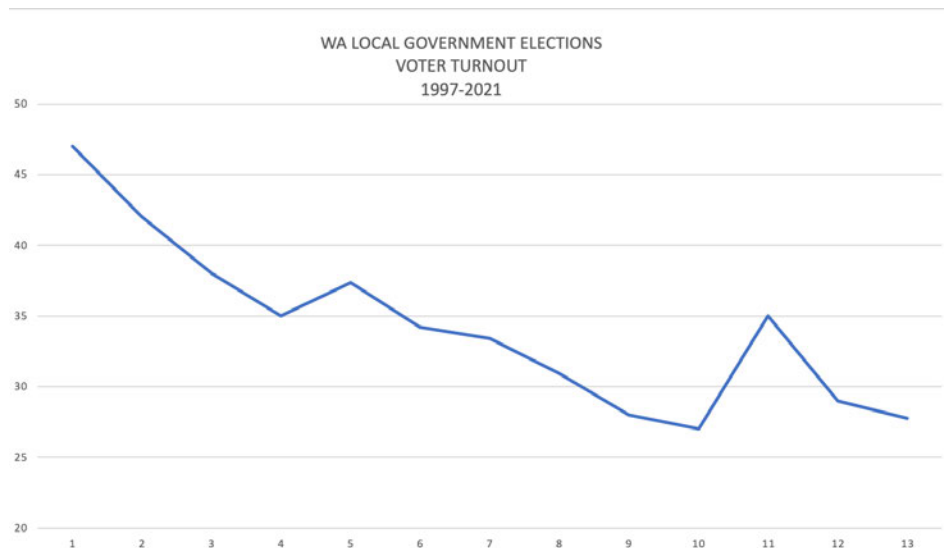


Under the heading of Civil and Political Rights the 2019 ALP Platform says the party supports:

*"Universal compulsory voting for all citizens over the age of 18 in both State and local government elections"*

One wonders why a Labor minister would struggle to introduce something that conforms to his own party's policy.

When only 30.2% of the population voted, the Five Eyes powers (US, UK, NZ, Canada, and Australia) issued a joint statement condemning the recent Hong Kong elections. In WA local government elections such an outcome would be an improvement on our abysmal voter turnout. The following graph is overwhelming evidence that voter turnout has collapsed since the introduction of postal voting.



Interstate comparisons are just as embarrassing as the Hong Kong one because in the non-compulsory voting states of Tasmania (59%), SA (33%) and WA (28%), we come a poor last. In the compulsory voting states of New South Wales, Victoria, Queensland, and the Northern Territory voters turn out to local government elections at the same high rate as they do in State and Federal elections.

While they are indicative only and not good direct comparisons, when we look a bit wider than Australia and, we see that:

- In the USA 2020 Presidential election turnout was 67% (Their all-time high is the 1860 election of Abraham Lincoln at 81%).
- And the last UK General election was 67% also (Their all-time high is the 1950 election at 84%).

Just a reminder that WA local government elections in a similar period had a 28% turnout, which is the lowest in the nation.

When over 70% of the eligible population does not vote, it is many things, but it is not a participative democracy. No-one elected under this system can claim any form of electoral legitimacy or mandate, and it seems the government is determined to maintain that disconnect.

Why would any minister introduce a more expensive voting system that does not conform to the national norm, breaches his party's policy, is shunned by voters, and will reintroduce the very system of preference whispering that the government has just removed from state electoral laws for the upper house of parliament?

For whatever reason, past state legislators thought that continuity on elected local government bodies was important, so they required staggered elections through the s 4.78(2) and Schedule 4.2 s 1 which require:

*“As near as practicable to 1/2 of the total number of councillors as the returning officer determines are to retire every 2 years.”*

No such provision could, or would, exist in any other level of government. By way of example, can you imagine the response if Premier, Mark McGowan was required to have former Liberal/National Ministers in his cabinet? Conceding that local government is not a parliamentary system, electors should still have the right to vote all councillors into and out of office should they so choose to.

This is an untenable provision that prevents a community from ever being able to vote to reform their local government.

There is no doubt that the removal of the split vote, and the introduction of compulsory optional preferential voting are the best vehicles to deliver electoral legitimacy to local government and they should be introduced without delay.

#### **ITEM 4.4 PUBLIC VOTE TO ELECT MAYOR OR PRESIDENT**

Because it only applies to Band 1 and 2 local governments this is another proposal that implements a size and scale regime of governance and for that alone it is a bad move that should be rejected.

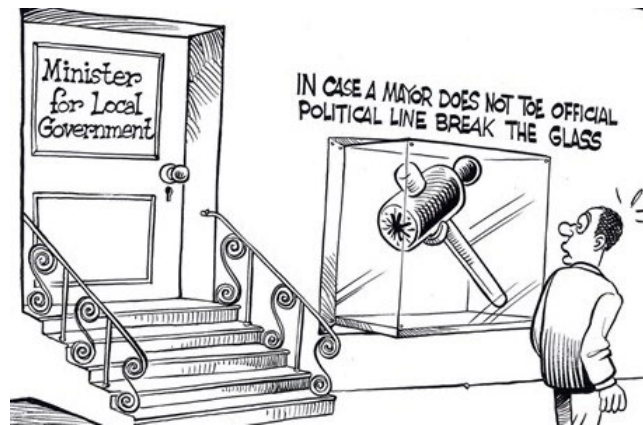
s 2.8 of the current act only empowers presiding officers to chair meetings, provide leadership to the community, carry out ceremonial duties, speak on behalf of council, and liaise with the CEO. There are no executive powers and apart from their liaison power, presiding officers have the same legislative restrictions placed on their ability to direct staff or interfere in administrative matters as does any other councillor.

Advocates for this change claim it is democracy at work, but the reverse is true because directly electing Mayors/Presidents is most likely to entrench dysfunction by producing office holders with no genuine electoral authority and who may also lack the collegiate support of their peers.

At the City of Perth, the incoming Lord Mayor was elected with 1855 votes. However, in the subsequent councillor elections, every councillor elected exceeded that number, as did some of the losing candidates. So, who was granted an electoral mandate to represent the community interest? Those with a higher vote or a directly elected presiding officer with a significantly lower vote? Please note that there is no criticism, implied or otherwise on any of those involved at the City of Perth. This is no more than a comment on the voting and electoral system and should not be misconstrued as anything other than that.

Direct election of Mayors/Presidents is an unwarranted Americanism that gets inserted into our system without considering the executive supports that are available under the American system. It is not widely understood how different the US and our systems are, but if we are to shift to their system at a local level it will be necessary to make provision for independent executive staff for the Mayoral/Presidential office. No such change is envisaged by these proposals and my preference is for the retention of a collegiate system of electing one Councillor to be the first among equals.

It is best to end this section where it all started; our presiding members are empowered with a casting vote in the event of a tie, but they do not get any executive powers under the LGA. s2.8 of that act defines their role but makes no provision for them to run or be elected to do anything other than what a council decides. Popularism aside, there is no justification for this change, and it should be removed.



#### ITEM 4.5 TIERED LIMITS ON COUNCILLOR NUMBERS

This is a positive change with one small caveat. Because of the seasonal nature of the industries in their district, some smaller country councils may have difficulty with quorums at certain times of the year. This is not a reason to jettison the downsizing proposal, it is a reason to allow an appeal process enabling ministerial approval/rejection after an advertised period for public comment.

#### ITEM 4.6 WARDS

As it only applies to Band 3 and 4 local governments this is another proposal that implements a size and scale regime of governance. Simply put, wards are an abomination and should be abolished. There are no requirements (and I am not advocating there should be) that a person nominating for a specific ward lives in it, works in it, or has even been to it.

Wards are promoted as being like Parliamentary seats; but they are not in any way comparable. There is no ability to form a government based on a parliamentary majority of wards won in a local government. Whether there should be mini-parliamentary local governments is an entirely different discussion that is not broached in this process.

The LGA requires councillors to represent “*the interests of electors, ratepayers and residents of the district*” which means that without amending this part of the LGA, it is unlawful for a councillor to represent the interests of a ward, if doing so conflicts with the district interest. If the interests of the ward and the district do coincide, there is no need for wards. However, if the law is changed to allow representing the interests of a ward over the greater district interest, local government is rendered unworkable.

Manipulating elections by using wards to circumvent the s 4.56 of the LGA occurs when there are more electoral nominations than vacancies, but no-one has nominated in one ward. At the last minute, one nomination is lodged in the vacant ward and that nominee is then declared elected unopposed. More nominations than vacancies should result in an election and regardless of the outcome of these ward proposals, this anomaly needs be rectified.

Why should someone elected by a tiny minority in one ward get to determine matters affecting people who are precluded from voting for or against those making decisions? There is very good historical precedent in the USA about what happened when there was taxation without representation.

As I said at the outset, wards are an abomination that should be abolished.

#### **ITEM 4.7 VOTER ELIGIBILITY**

This is not reform; it is simply changing a process that should not exist.

If our decision makers do not understand that buildings should not be entitled to vote, there will be precious little meaningful reform of local government. Voting entitlement should be enrolment on the electoral rolls operated by the WA Electoral Commission and the basis of enrolment at every level should be residency.

Property based electoral franchise is at odds with any understanding of modern democratic processes and property franchises were abolished at state/colonial level in WA in the 1890's and nationally in 1902.

There is no justification for retaining these antiquated 19<sup>th</sup> century provisions.

#### **4.8 REFORM OF CANDIDATE PROFILES**

This is a matter that should be handled by the WA Electoral Commission on the same basis as that which applies in State and Federal Elections. It should not be a provision in the LGA.

#### **4.9 MINOR ELECTORAL REFORMS**

Electoral matters should be removed from the LGA and placed in the Electoral Act 1907

### **THEME #5 – CLEAR ROLES AND RESPONSIBILITIES**

*“It is always best to dispense with the detail in the name.” Sir Humphrey Appleby*

#### **5.1 INTRODUCING PRINCIPLES IN THE ACT**

It is not clear why the “expert” panel at their Recommendation 7 outlined a set of guiding principles for any new act.

Whilst they form part of laws, expecting improvements in governance by legislating non-obligatory and unenforceable principles, processes, charters, guidelines, and templates always fails. Conversely, clear, concise, and well-defined laws showing the intent, obligations, enforcement powers and penalties are far more likely to produce good outcomes.

The problem for those advocating change in this area is that s 1.3 of the LGA is clear, concise, and competently explains not only why we have a system of local government, but it also tells us what we can expect from it. There are matters that could be included in any modernisation of the LGA, but these new proposals provide little detail about what any new principles may be, they give no advice on how, or even if these principles would work and they outline nothing of any value other than to advise that the “expert” panel recommended “*greater articulation of principles*”; whatever that may mean. For its part those “experts” recommended that “*the following overarching guiding principles are included in the new Act:*

*“To ensure the system of local government is sustainable, accountable, collaborative and capable, councils should:*

- 1. Provide democratic and effective representation, leadership, planning and decision-making;*
- 2. Be transparent and accountable for decisions and omissions;*
- 3. Be flexible, adaptive and responsive to the diverse interests and needs of their local communities, including the traditional owners of the land;*
- 4. Consider the long term and cumulative effects of actions on future generations;*
- 5. Ensure that, as a general rule, all relevant information is released publicly, readily available and easy to understand;*
- 6. Provide services in an equitable manner that is responsive and accessible to the diverse needs of the community;*
- 7. Seek to continuously improve service delivery to the community in response to performance monitoring;*
- 8. Collaborate and form partnerships with other councils and regional bodies for the purposes of delivering cost-effective services and integrated planning, while maintaining local representation of communities and facilitating community benefit; and*
- 9. Participate with other councils and with the State and Federal government in planning and delivery of services, setting public policy and achieving regional, State and Federal objectives.”*

What wonderful warm and fuzzy claptrap that is. To take but one of them apart, let us look at Principle 9; were any local government to follow that principle they would find themselves *“setting public policy and achieving regional, State and Federal objectives.”* What about local objectives? Any *“local governing body”* that chose to focus on its constitutional responsibility to the *“area in respect of which the body is constituted”* would be in breach of this principle.

The other principles that were proposed by the “expert” panel can be similarly deconstructed and that may well be why these proposals do not contain any detail. Including principles of this kind adds nothing to the current provisions of the LGA and for that reason they are opposed.

Turning to the proposals, the first dot point after the proposal to include principles in this part is a recommendation for the recognition of Aboriginal Western Australians in the LGA, which, if it is done properly is a long overdue and beneficial change.

The second dot point is headed *“Tiering of local governments”*.

*“Tiering of local governments”* is a cleverly worded con that arose from the “expert” panel review granting WALGA’s demand for the LGA review to *“Promote a size and scale compliance regime”* by rejecting it, renaming it, and then recommending it under another name. The “experts” said:

*“The Panel recognises the diversity of local governments in Western Australia and supports a new Act which is responsive to this but does not recommend the adoption of a multi-tiered legislative framework”*

Having ruled it out, the “experts” then went on to say:

*“The Panel explored having different requirements and obligations under the new Act depending on a local government’s size, scale and/or demographics. However, finding the balance of what local governments should be required to do and for what reasons proved difficult. The Panel decided that a more practical approach was for the new Act to apply minimum standards to all local governments and, where applicable, to provide flexibility within the new Act that enables a diversity of obligations to be placed on or assumed by local governments dependent on their capacity and capability”*

In a third of a page of their report these “experts” rejected a proposition, renamed it, and then re-recommended it. See why I say this is a con?

For their part WALGA has been resolute, they want lower financial reporting standards for smaller local governments.

No one has ever explained any valid reason for reducing compliance in the areas of the highest risks and failings. As was pointed out earlier, the rhetorical position is that these smaller local government are isolated and in remote areas; but that is not so. Bassendean, Claremont, Cottesloe, East Fremantle, Mosman Park, Peppermint Grove, and most country local governments fit this description. Returning to the matter at hand, at Recommendation 1, the Select Committee said:

*“The Government consider implementing a compliance regime that differentiates between local governments based on their size and scale where appropriate.”*

For its part, the government’s formal response to the Select Committee advised Parliament that:

*“The introduction of a size and scale approach to compliance would still need to ensure that there is an appropriate level of accountability and oversight. This will be considered as part of the development of a new Local Government Act.”*

The Government response is significantly less supportive of this change than the Select Committee was, but there is nothing in these proposals to demonstrate that the government has addressed what it calls *“an appropriate level of accountability and oversight”*. So, what is the official government position? Is it that outlined by their response to the Select Committee or that proposed here? Again, we do not know which makes any meaningful response difficult.

These proposals grant concession to the WALGA claim but are not sufficient to overcome the concerns of either the government itself, or the “experts”. Those concerns are heightened when one considers that the serious governance problems in this State are with smaller country local governments. The CCC and departmental inquiries and reports on Exmouth, Ravensthorpe, Carnarvon, Perenjori, Toodyay, Dowerin, Wiluna, Halls Creek, to name but a few, highlight the need for more and not less *“accountability and oversight”* in smaller local governments.

This proposal overturns the formal government response to the Select Committee, grants WALGA’s claims and ignores the crusty issue of structural reform and dodges the structural issue entirely.

Structural reform is the overriding issue that requires examination. The “expert” panel’s Recommendation 9 said

*“The Panel recommends that through their Partnership Agreement and the proposed Local Government Commission, State and local government consider options to facilitate structural reform that will strengthen the capacity and resilience of the local government system. Those options should include:*

- a. Revised processes for boundary changes and mergers.*
- b. Substantially increased cooperation between local governments through an enhanced model of joint subsidiaries.*
- c. Provision for the establishment of community boards within local government areas.”*

The Select Committee’s Recommendation 6 said:

*“The Legislative Council and the Government consider establishing a Joint Select Committee to inquire into structural reform of the system of local government in Western Australia”*

The Government’s official response to the Select Committee report said:

*“Mechanisms to more effectively enable structural reform of the system of local government will be considered as part of developing the new Local Government Act.”*

These proposals reject all of those considered positions and in the absence of any rational argument to the contrary, favour WALGA over the advice of the government appointed “expert” panel, the Parliamentary Select Committee and the government’s own official responses. An explanation is needed and until one is forthcoming this proposal should not be proceeded with.

There is no detail or information to support the next dot point: *“Community Engagement.”* One assumes that this is the same as item 4.1 where this paper deals with it.

Similar things apply to the next dot point *“Financial Management”* which one assumes relates to Item 6.1 *“Model Financial Statements and Tiered Financial Reporting”*.

## **#5.2 – GREATER ROLE CLARITY**

Not liking or agreeing with provisions of laws is not the same thing as rendering them incorrect and because the provisions of the State Constitution and the LGA are crystal clear and have stood the test of time. This section is one of the larger failings of this review process. The genesis of this part is the report of the “expert” panel who recommended:

*“...significant changes in the Act to the current statements of roles and responsibilities for mayors/presidents, councillors and CEOs and that the Act should include a new statement of responsibilities for the “council which captures the roles and responsibilities of all councillors acting collectively as the council.”*

As pointed out in other places in this paper, there is no legislated role for a CEO; the current Act lists CEO’s cumulative functions and that is because the two parties (council and CEO) are not equals, which is also dealt with in another part. Those fundamental differences in power, authority and standing are consistently overlooked or downgraded by the legislative



reviewers and the local government club and because it is fundamental to the operation of a democratic local government system, it should not be so.

The “expert” panel report included the creation of executive functions for mayors/presidents. For reasons outlined earlier, this is a dangerous proposition that is not mentioned for introduction by these proposals. However, the greatest power imbalance in the sector is the inherent conflict between a council and a CEO, which is bizarre because the two positions are not equals:

- Elected governing bodies are granted powers by the constitution and the LGA; CEOs are not; and
- Local governing bodies are a statutory construct; CEOs are not; and
- s 2.7 of the LGA defines the ROLE of councils; and
- s 5.41 of the LGA defines the FUNCTIONS of CEOs; and
- s 5.36 makes it clear that a CEO and all employees are employees of the council.

One of the drivers for the current act was a legitimate requirement to end individual councillors’ ability to direct administrations and CEOs and the LGA does that, but the restrictions on individual councillors’ actions have been extrapolated to include councils. This is not correct and the concerted efforts by, and the combined power of, CEOs, their professional association and WALGA have convinced nearly all that there is an enduring separation of powers between administration and the local governing body. This is not correct.

In terms of the functions of local governments, nowhere in the LGA are there any provisions granting a CEO any independence from a local governing body. Because the respective roles and functions of each position are clarified and the thrust of this part of the act are the opposite of independence and there is no lawful separation of power as is claimed by the sector.

This separate power proposition is pure fiction, and it is informative to follow the evolution of this item. Under the auspices of WALGA and LG Pro, the role and functions of elected officials have been subjugated to the interests of unelected employees who have created a position for themselves that is unlike any other. But even then, WALGA submitted to the LGA review:

*“The current role statements in the Local Government Act for the Council, Elected Member and CEO are considered reasonable, however a number of Local Governments have indicated that interpretation of the current wording is ambiguous and have indicated that stronger clarification of the roles of the Council and the CEO would be beneficial.”*

WALGA advised the legislative review that the role statements “for the Council, Elected Member and CEO are considered reasonable” and says the problem is one of “interpretation” for some local governments. Laws should not change simply because some individuals misinterpret them, but interpretive difficulties for local governments are easily handled. When councils, CEOs or councillors ring the regulating department for advice, it tells them what that section means.

The Select Committee recommended that:

*“The Government clarify the roles of council and the chief executive officer, and the distinction between governance and operational matters, in any new local government Act.”*

Bizarrely, the Government response to that recommendation was that:

*“The Local Government Act 1995 already provides for a separation of powers between the council and the administration.”*

The LGA does no such thing; and that is because a *“separation of powers between the council and the administration”* does not exist.

The WA constitution and the LGA both provide for power to reside with the elected governing body. The elected body is to govern, and the administration is to administer; there is no conflict of power, nor is there any separation of power.

The evidence quoted earlier from the DG and the department that was presented to the Select Committee clearly demonstrates that the regulator does not understand this central issue. And it is critical that decision makers in this process fully comprehend that the separation of powers in our adapted Westminster system refers to a fundamental design feature and those with any doubt about the meaning of the separation of the powers between the executive, judiciary and legislature should read Chapters I, II and III of the Federal Constitution.

This is not a minor or semantic point – it is the overriding factor that drives most of the dysfunction and division in local government and its root causes are misreading and deliberate misinterpretation of provisions of the LGA.

- s 5.41 Functions of CEO – is now claimed to empower the CEO at the expense of individual councillors in a way that the law does not envisage.
- s 2.6 (1) mandates that the elected council and not the CEO is the lawful governing body.
- s 2.7 Role of Council has been conservatively interpreted to establish the separation of powers claims – which it does not; s 2.7 (1)(b) bestows considerable power to councils. to oversee their CEOs and (2) (a) makes it clear that council has both financial and practical oversight over administrations.
- s 2.8 Role of Mayor or President (f) has been interpreted as a decision-making power which it is not; it is an administrative and coordinating role. There is no legislative backing for any decisions that conflict with or are not authorised by council’s decisions or policies. (Delegated authority to a CEO should not invalidate council decisions or policies)
- s 2.10 Role of Councillors has been wrongly interpreted to mean that individual councillors have no significant power or role in Local Government.

There is also no such thing as a *“distinction between governance and operational matters”*.

The current LGA s 5.41 (c) and (d) set the functions of a CEO to, inter alia:

- *“cause council decisions to be implemented; and*
- *manage the day to day operations of the local government”*

Those provisions make it clear which body (CEO or Council) has the power and which has the responsibility to follow orders. This position was further validated by the CCC Report into the Shire of Dowerin, which said”

*“[30] This bifurcation of responsibility may cause confusion as to the extent to which a council can inquire into the operations of local government.*

*[31] Mr Martin was appointed acting CEO following Mr Alcock's resignation. He is very experienced and has acted as CEO in similar situations. He was asked about the difference between operational matters and councillors understanding:*

*This issue of operational, the separation of roles in the Act, is quite often used as a shield by CEOs. “Butt out; that’s now operational,” so some elected members, particularly those who haven’t been to training or haven’t any widespread knowledge of local government, they may have concerns, and don’t know how to go about dealing with it.*

*... In my view where the issues of concern relate to the governance of the Shire, elected members have a legitimate right to be involved and ask questions. They’ve got the power but they don’t know because they rely upon the CEO to tell them what they don’t know or what they need to know.*

*[32] The Commission is of the same opinion.”*

It is important to reinforce that in a functioning democracy, no system should deliver greater power to unelected administrators than it does to elected representatives.

I reiterate that the claimed separation of powers and distinction between operational and governance matters are pure fiction and are not supported by the LGA or the WA Constitution.

#### **5.2.1 MAYOR OR PRESIDENT ROLE**

Many of the issues relating to this part were dealt with at point 4.4.

One should resist change for change’s sake and when one considers s 2.8 of the current LGA one wonders what is unclear, incorrect, or lacking in it:

*“(1) The mayor or president —*

- (a) presides at meetings in accordance with this Act; and*
- (b) provides leadership and guidance to the community in the district; and*
- (c) carries out civic and ceremonial duties on behalf of the local government; and*
- (d) speaks on behalf of the local government; and*
- (e) performs such other functions as are given to the mayor or president by this Act or any other written law; and*
- (f) liaises with the CEO on the local government’s affairs and the performance of its function.”*

There are two weasel worded provisions in the proposals, they are:

- *“Developing and maintaining professional working relationships between councillors and the CEO, and*
- *Working effectively with the CEO and councillors in overseeing the delivery of the services, operations, initiatives and functions of the local government.”*

The first of these is bureaubabble and should be ignored; the second however proposes a fundamental change in local government in that it transfers a power held by council to the presiding member and creates unchecked executive power. There is no advice in this part to demonstrate how this newly created executive power will be overseen, managed, limited, or accounted for.

Given the desire to reduce what is euphemistically referred to as the “separation of powers” or “operational matters” the reviewers are taking us back to the pre 1995 provisions by proposing to empower a presiding member to oversee the *“delivery of the services, operations, initiatives and functions of the local government”*.

This proposal creates executive power for a presiding member and the tasks being allocated to the presiding officer’s role in this part are clearly the role of a council, thereby downgrading the elected governing body’s role to that of a rubber stamp for executive action. The alternative is that, at the very least, these powers will be held by both the presiding member and the elected governing body.

Compounding that concern is that this requires the presiding member to also work with the CEO in those things; what happens if the CEO and the presiding member disagree? There are almost unlimited permutations of how this poorly defined and considered requirement divides power and authority in the governing body. With the most likely outcome being that the presiding member and CEO will collude to the exclusion of the elected governing body.

This is a dangerous, and significant change to local government that should not be proceeded with.

### 5.2.1 COUNCIL ROLE

For want of repeating myself, when one considers the current provision at s 2.7 of the current LGA one wonders what is unclear, incorrect, or lacking when it says:

- (1) *“ The council —*
  - (a) *governs the local government’s affairs; and*
  - (b) *is responsible for the performance of the local government’s functions.*
- (2) *Without limiting subsection (1), the council is to —*
  - (a) *oversee the allocation of the local government’s finances and resources; and*
  - (b) *determine the local government’s policies.”*

The first point says:

*“Making significant decisions and determining policies through democratic deliberation at council meetings”*

Already the role of a council has been downgraded from being the governing body to one where someone will need determine what is a significant decision.

This change should be vehemently opposed.

The second dot point says (inter alia):

*“Ensuring the local government is adequately resourced...”*

Once more the role of the elected governing body is downgraded from that prescribed in the current provisions to one significantly less direct and significantly more subjective.

This change should also be vehemently opposed.

The third dot point says:

*“Providing a safe working environment for the CEO”*

As this is already a workplace requirement, there is no need for such a provision to be included in the LGA. At best one would expect the regulating department to issue a guideline pointing out the council’s responsibilities as an employer.

The fourth dot point says:

*“Providing strategic direction to the CEO”*

What possible justification could there be for changing a law to restrict the power of an employer to only “providing strategic direction” to its employee? This proposal removes the powers of the elected governing body to oversight, assess and control its employee. It is important to note this part is not about the powers for individual councillors and what is proposed is a significant diminution of the powers and capacity of the elected governing body.

It is also unclear how this proposal improves the current LGA provisions; there is no supporting evidence or detail to support a change and until such time as it is produced there is no reason to support this.

The fifth dot point says:

*“Monitoring and reviewing the performance of the local government.”*

One wonders how this suggestion improves the current provision and until some evidence to support it is produced there is no reason to support this change.

#### **5.2.1 ELECTED MEMBER (COUNCILLOR) ROLE**

This part of the LGA is where councillors should be able to turn to get clear direction on their role at law; however, that will not be possible under these proposals because judgemental

rhetoric has intruded into the law-making processes. For example, when describing the decision making of councillors, the pejorative words “*without bias*” are used.

Who would determine whether an elected member is acting with or without bias? Is this to be the role of the CEO? The monitors? The Inspectors? The Department? We simply do not know because there is no information provided and nor should there be because that wording should never be included in any further publications.

Those demeaning words are not directed at anyone other than elected members and this highlights the structural dysfunction of the local government partnership with the state. That corrupting arrangement excludes any input from either elected members or the public, which ironically entrenches a bias in this review.

Wherever they appear, these pejorative statements should be removed.

In a similar fashion to MP’s, individual councillors have little direct power because those they had, or purported to have, were codified, and largely removed by the 1995 Act and it is here that one of the false dichotomies of local government has its genesis. The 1995 Act was legitimately aimed at preventing individual councillors from interfering in the day-to-day affairs of a local government and it was successful in this.

Since then, powerful forces have expanded those individual restrictions to create an independent republic of administration. It was never intended that the CEO and council powers would be equal it was always envisaged, in fact it is required that the council collectively is the responsible governing body.

The first dot point in this part makes another significant change to local government in this state:

*“Considering and representing, fairly and without bias, the current and future interests of all people who live, work and visit the district (including for councillors elected for a particular ward)”*

For some unfathomable reason a councillor will now be responsible for the “*the current and future interests of all people who live, work and visit the district*”. If this is introduced, a councillor will be responsible for the current and future interests of all people “*who live, work and visit the district*” – not the majority of those who live, or work, or visit the district; they must do those things for all those people. Then somehow individual councillors must know who is doing all those things before they can consider and represent their interests. And a councillor will also be responsible for the current and future interests of all people who VISIT the district?

Is it even possible to do those things? I think not, but even if it is, it is not what this part requires; these poor councillors are going to be very busy being responsible for doing those things for ALL people who...

But then having done this for all those people, these proposals require councillors to also do the same things for “*councillors elected for a particular ward*”. Leaving aside the obvious question of why one would do that, this part begs the question of which “*particular ward*” councillors are to do these things for.

These provisions should never be included in any law.

The second dot point in this part requires councillors to:

*“Positively and fairly contribute and apply their knowledge, skill, and judgement to the democratic decision-making process of council.”*

These largely rhetorical propositions again raise the judgemental nature of the language and if taken literally this part means that no councillor would ever be able to vote in the negative in a council decision making process. In any event, there is no justification in including provisions like this in a law; if properly written, such provisions could fit into a code of conduct, but even then, they would be superfluous.

The third dot pointing this part is a statement of the obvious that should not be legislated. It is untenable to have a law telling people that they are to obey the law. The rule of law is fundamental to any democratic system as was outlined by Royal Commissioner Kenneth Hayne who said:

*“The first general rule, that the law must be applied and its application enforced, requires no development or explanation. It is a defining feature of a society governed by the rule of law.”*

Any doubt about the role of the law is cleared up by the definition appearing on the webpage of the [Federal Attorney General’s Department](#):

*“The rule of law underpins the way Australian society is governed. Everyone - including citizens and the government - is bound by and entitled to the benefit of laws.”*

This proposition should not be included in any new law; any elected representative or bureaucrat who is unaware of the rule of law needs to be immediately retrained or removed from public office.

The fourth, fifth, sixth and seventh dot points of this part are superfluous because the current provisions at s 2.10 of the LGA are clearer, more concise, and better describe the role of a councillor.

*“A councillor —*

*(a) represents the interests of electors, ratepayers and residents of the district; and*

*(b) provides leadership and guidance to the community in the district; and*

*(c) facilitates communication between the community and the council; and*

*(d) participates in the local government’s decision-making processes at council and committee meetings; and*

*(e) performs such other functions as are given to a councillor by this Act or any other written law.”*

No-one has made a case that this legislated definition of the role of councillor is deficient, and I return to the WALGA statement that the legislated descriptions “*for the Council, Elected Member and CEO are considered reasonable*”

The final rather Orwellian dot point of this part relates to the use of the title of an elected member and there is no justification, explanation, or reasoning for the proposal. Is it envisaged that there will be penalties for breaches? If not, what is the point of including such a condition and if so, who will police the breaches? Will similar provisions apply to CEOs? If not, why not?

Imagine the scenario where, as often happens, a local government CEO and a councillor are invited as guest speakers at a local charity function. They are not there in their official capacities to speak on behalf of the council, they are invited to speak as prominent local identities. The CEO can introduce himself using his title, but if the councillor does the same, he is in breach of this proposed provision; and one assumes the CEO is then duty bound to report that councillor’s breach.

This is a classic case of legislative micromanagement; it serves no useful purpose, can never achieve any meaningful outcome, and only serves to denigrate and downgrade elected representatives.

This proposal should not be proceeded with.

#### 5.2.4 CEO ROLE

*James Hacker: I wonder what Humphrey will say.*

*Dorothy Wainwright: Whatever he says, I want to be there when you tell him.*

*James Hacker: To witness the clash between the political will and the administrative will?*

*Dorothy Wainwright: I think it'll be a clash between the political will and the administrative won't.*

Groupthink is a phenomenon where people subjugate one set of interests in order to placate the group they are in. When a clublike atmosphere develops, when external input is disparaged and when counter views are discouraged, groupthink is the most likely outcome. This part is a classic example of groupthink and it happened in the local government club where only those with direct interests in outcomes were involved in deliberations on these matters.

Subtly worded, these proposals reward already powerful unelected bureaucrats, reduce oversight, degrade democratic input, and perpetuate the separation of power myth. The authors of these proposals clearly do not understand the provisions of the LGA, the constitution, or how our system of government works.

As important a role as it is (and apart from some statutory functions), a CEO’s authority comes from the governing body’s adoption of policy, delegation and some limited interaction between the Presiding Officer and CEO. It is critical that readers of this part should note the difference



between power and function, and we are talking about the powers established at law. The relevant parts of the LGA are:

- *“s 2.7 of the Act defines the role of council as the “governing body” of a local government; and*
- *s 2.8 defines the role of the Presiding Officer as the office holder who “liaises with the CEO on the local government’s affairs and the performance of its functions”; and*
- *s 2.10 defines the role of councillors to represent “the interests of electors, ratepayers and residents of the district” and also as someone who “participates in the local government’s decision-making processes at council and committee meetings”; and*
- *s 5.41 defines the CEO’s functions; but interestingly does not define a role and that is important because there is a significant difference between a functionary and someone with legislated decision-making power.”*

Under s 5.41, the functions of the CEO are to -

- (a) “advise the council in relation to the functions of a local government under this Act and other written laws; and*
- (b) ensure that advice and information is available to the council so that informed decisions can be made; and*
- (c) cause council decisions to be implemented; and*
- (d) manage the day to day operations of the local government; and*
- (e) liaise with the mayor or president on the local government’s affairs and the performance of the local government’s functions; and*
- (f) speak on behalf of the local government if the mayor or president agrees; and*
- (g) be responsible for the employment, management supervision, direction and dismissal of other employees (subject to section 5.37(2) in relation to senior employees); and*
- (h) ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law; and*
- (i) perform any other function specified or delegated by the local government or imposed under this Act or any other written law as a function to be performed by the CEO.”*

It is important to note that this is a definitive list and the conjunctive “and” at the end of each sub-clause means that these functions are cumulative, i.e. each function is to be carried out by a CEO.

As it is important to note that this section is headed “FUNCTIONS OF THE CEO”<sup>(my emphasis)</sup> and none of those provisions grant any independent power to a CEO; at best they allow limited discretion in the day-to-day operations of the organisation but only as far as to ensure that it is implementing the decisions of council, government regulations and/or departmental guidelines.

Some argue that sub clause (e) of s 5.41 enables the presiding member and CEO to make decisions on behalf of council. I vehemently disagree with that and submit that this clause was inserted to allow the presiding member and CEO to liaise with each other to manage the day-to-day business of a council between meetings, but that management must accord with the decisions/policies/laws etc of the governing body.

Other than the respective delegation provisions (s 5.42 – 5.45) and obligations under other laws, I submit that there are no provisions that allow a CEO to make any decisions that fall outside of the day-to-day operations of the organisation. Whether there should be is a question

that has not been addressed publicly. However, these proposals deleteriously affect the critical relationship between a CEO and a governing body in ways that are not immediately obvious.

In defining the functions of any position, it is critical to comprehend the purpose of the position. In this instance the ongoing and ill-informed departmental and ministerial views about what they call a “separation of powers” clouds and impedes good judgement to the extent that this issue must be scrutinised once more.

When talking about a council’s ability to seek legal advice the department said this to the Select Committee:

*The CHAIR: Just to tease out that theme a little further—again, this is in response to matters raised with us—one of those questions that arises is: does the act permit a council to seek external legal advice or other external professional advice without the involvement of their CEO and staff?*

*Mr ORD: The situation is where appropriate. The higher order principle is the separation of powers. The act really provides that the CEO and the administration are tasked with doing and gaining advice at the request of council so council can make a well-informed decision.*

*There are circumstances where council might reasonably need to secure that advice themselves, particularly where it involves the CEO—for instance, a contractual matter with the CEO. You might wish to ensure that the council had independent legal advice on a contract matter for the CEO where you would not be going to the CEO saying, “Please go and procure that advice.” It is not an absolute “No, they can’t do it” by any means, but it needs to be appropriate to preserve the separation of powers. If it is reasonable for the council to seek the advice for themselves—to seek advice on a matter of administration in the agency—that would normally be done by the council, and could be done by the council, and I do not believe that is allowed for under the act.*

*The CHAIR: So, in matters quite clearly where there would be a conflict of interest for the CEO or other senior officer—their own terms of employment is the obvious one—there is no impediment, and, indeed, there is probably a necessity for a council to get external advice —*

*Mr ORD: Subject to the council voting to do so, of course.*

*The CHAIR: Of course. We are not talking about an individual person running off willy-nilly and getting lawyers and things. But in other more day-to-day circumstances, it would be seen that the act does not provide for councils to get external professional advice. Is that the gist of your response?*

*Mr ORD: As an alternative to getting the administration to do what they should do, then no.*

*The risk is, obviously, that you then start to be becoming operational at the council level through the actions of getting advice, and what constitutes that advice, and does the advice then lead to action, and if it leads to action, then it is administrative action and we believe it would be inconsistent with the intent of the act. So, for normal circumstances, the council would normally instruct the CEO to seek expert advice on a particular development or whatever it might be. Then we believe that that is the way that it should proceed, and that advice should be sought by the CEO in an appropriate context and provided to the council, as requested. I think, again, that there is good reason why the separation of powers does need to be strengthened and supported at that level, but, again, as I said, there are*

*exceptional circumstances, where, of course, it would be absolutely appropriate for a council to understand that they would need to get their own advice on key matters of contract law or discipline or such.”*

As outlined earlier in this paper, the relevant provisions of the LGA that say the opposite of what the DG posited and that bewildering statement from the highest bureaucratic office demonstrates the regulating department has an extremely limited understanding of the LGA.

This friction between the two positions of council and CEO was also raised as an important issue in the City of Perth Inquiry and Commissioner Tony Power said:

*“The LG Act recognises the importance of the demarcation between a local government’s Council and its Administration.*

*In broad terms, the former should decide what should be done for the community as a whole and the latter is responsible for implementing those decisions in a practical and day-to-day sense.*

*This essential separation of roles ensures that the community as a whole has a say in how the local government represents its interests. It does so through its council members, who form the Council which makes decisions and sets the direction of the local government.*

*The Administration of a local government is made up of a variety of skilled and experienced employees, who are best equipped to ensure that the community gets what it needs and deserves. The Administration implements the decisions of the Council and provides services to the community.*

*Each of these two groups of people which comprise a local government, the Council and the Administration, have different skills, mandates, powers and functions. Their roles are different and should not be confused. The employees in the Administration should not try to usurp the decision-making role of the Council, and council members should not interfere in the day-to-day work of the Administration.* (Highlight added by me)

*The conduit or connection between the Council and the Administration is the Chief Executive Officer (CEO). This pivotal and sometimes difficult role, if done well, should maintain that important separation and ensure that the employees of the local government properly implement the decisions of the Council. It should also ensure that good governance is applied to the functioning of both the Council and the Administration.”*

Please note that the highlighted penultimate paragraph of the COPI quote clearly demarcates between the council and individual council members. The reason for including both of those long quotes is to highlight and draw attention to how the department (and by implication successive ministers) simply do not understand that the claimed separation of powers does not exist. This important point was reinforced by the CCC into the Shire of Dowerin, which said:

*“Extensive submissions were received from lawyers acting on behalf of the President and Deputy President of Dowerin arguing in essence:*

- The LGA does not set out a duty on council to be a check and balance on the CEO or on financial reports presented to it; and*

- *Council has no responsibility for close financial oversight.*

*[16] These are matters of legal opinion with which the Commission fundamentally disagrees. The LGA provides a governance framework that mandates council's responsibility to govern the local government's affairs."*

Individual councillors can only involve themselves in the administration in very tightly defined circumstances, however councils, as the elected governing bodies not only have the right to interfere in administration – s 2.7 of the LGA actually obliges them to do so, it says:

*“(1) The council —*

*(a) governs the local government’s affairs; and*

*(b) is responsible for the performance of the local government’s functions.*

*(2) Without limiting subsection (1), the council is to —*

*(a) oversee the allocation of the local government’s finances and resources; and*

*(b) determine the local government’s policies.”*

No such power, or for that matter no power, is granted to a CEO under the LGA.

The two positions are not equals, one is empowered to govern, and the other is their employee.

Under the LGA, all power resides with the council and none with the CEO; unless a council delegates its functions, a CEO has no powers under the LGA. Readers, please note that a delegation does not transfer the power, it transfers the function with the power and responsibility remaining with the delegating body.

The doctrine of the separation of powers is one of the fundamental design features of our system of democratic government and to have members of parliament, senior bureaucrats, ministers, and cabinet not only not understanding this fundamental concept, but then seeking to give their misunderstanding the power of law demonstrates a systemic failing in our system of government. And that is because one of the checks and balances of our system is cabinet government where ministers harness their collective wisdom and take collective responsibility for the output of cabinet. That these very poor proposals have come forward from a department, made their way through a ministerial office and have been endorsed by cabinet is an indictment on our system. In the same way as elected members in local government now have mandated training, this glaring misdirection at ministerial and cabinet level demands the same for ministers and senior bureaucrats.

Powerful forces in the sector have not sought to better define the role of these positions; they seek to relegate elected local government representatives to rubber stamp status while shifting power away from councils and onto their unelected employees. Minister Omodei’s law restricting individual councillors from directing staff has been continually misrepresented to apply similar controls on councils when the law dictates the opposite.

These proposals should not be proceeded with, but if they are, these changes will be long regretted in local government.

The first dot point in this part says:

*“Coordinating the professional advice and assistance necessary for all elected members to enable the council to perform its decision-making functions”*

The relevant provision of the current LGA is clearer, more concise than that being proposed.

A simple, but much needed, amendment empowering a CEO to provide advice to individual councillors is required. Currently s 5.41(b) of the LGA can be read to mean there is a restriction on a CEO to providing advice to individual councillors, so changing this provision to clarify a function of this kind is welcomed. However, if it is implemented as it is written, this proposal removes the ability of a CEO to provide advice and assistance to council and replaces it with responsibilities for all councillors. Now I am sure that is not the intention, but it is a poorly drafted and unclear provision.

The second dot point of this part says:

*“Facilitating the implementation of council decisions”*

Which is not as clear as the current provision which says:

*“(c) cause council decisions to be implemented”*

The third dot point of this part inexplicably says:

*“Ensuring functions and decisions lawfully delegated by council are managed prudently on behalf of the council”*

One can see the areas at which this is aimed, but it is unclear and should not be retained in its current format.

The fourth dot point of this part says:

*“Managing the effective delivery of the services, operations, initiatives and functions of the local government determined by the council.”*

The existing provisions s 5.41(c) and (d) are clearer, more concise and should be retained.

The fifth dot point of this part says:

*Providing timely and accurate information and advice to all councillors in line with the Council Communications Agreement (see item 5.3)*

The communications agreement will be dealt with under item 5.3, however the current s 5.92 of the LGA is sufficient and if it was properly enforced by the regulator, would be more than capable of dealing with these issues.

The sixth dot point of this part says:

*“Overseeing the compliance of the operations of the local government with State and Federal legislation on behalf of the council”*

This is an unnecessary provision as any local government office holder that does not understand their obligations at law should be removed from public office. Royal Commissioner Hayne made this clear when he said:

*“The first general rule, that the law must be applied and its application enforced, requires no development or explanation. It is a defining feature of a society governed by the rule of law.”*

The second and significant point related to this part is that, under the LGA s 2.7 it is the job of the governing body to govern and be responsible for the performance of the functions of their local government. If this power is to be changed or transferred to the CEO it needs to be made clear. But what is proposed is not clear, and a significant power is to be legislatively transferred away from the elected governing body and passed to their employee. This may well be unconstitutional.

This proposal should not be implemented until it is clear what it means. If it means that power will be transferred from council to the CEO it should not be proceeded with.

The last dot point of this part says:

*“Implementing and maintaining systems to enable effective planning, management, and reporting on behalf of the council.”*

All the points raised in the previous dot point about transferring powers from the elected governing body to their unelected employees and poor drafting are as valid here as they are above.

This proposal should not be implemented until it is clear what it means. If it means that power will be transferred from the governing body to their CEO it should not be proceeded with.

### **5.3 COUNCIL COMMUNICATION AGREEMENTS**

This proposal is a vehicle for placing impediments between a governing body, its elected members, and their employees.

The sole justification given for this is that there is a similar process in the state government system. Comparisons with state government are not appropriate, one is a formal parliamentary system, and the other is a subsidiary level of government constituted by an act of parliament. Simply put, these are not comparable systems. This is also not a matter that should be legislated; it is at best a regulatory matter; however, my view is that it is unnecessary in any form.

We are told that the regulating department will draft and publish a default template. Are we to put faith in the deskilled and under resourced department that has been captured by the local government club while its minister is in formal partnership with WALGA and LG Pro? When we look deeper into the performance of the department, we find that it also opposes compliance

with the current act. Under the current LGA, accessing information is clearly dealt with by s5.92 which says:

*(1) “A person who is a council member or a committee member can have access to any information held by the local government that is relevant to the performance by the person of any of his or her functions under this Act or under any other written law.*

*(2) Without limiting subsection (1), a council member can have access to —*

*(a) all written contracts entered into by the local government; and*

*(b) all documents relating to written contracts proposed to be entered into by the local government.”*

However, some CEOs have decided that the law does not apply to them and have made themselves the gatekeepers who control releasing information and the regulating department has fallen into line with that view, they say:

*“...but it is along <sup>(sic)</sup> held view by the Department which would be supported by WALGA and the sector, that as custodian of all official records held by the local government, the CEO is the responsible person for those records and documents, which is interpreted to mean that he or she determines in the first instance who is to have access to that information.”*

That innovative departmental interpretation is not what the law says and when a regulator agrees that the law does not mean what it says, no public system can properly function. This really is a simple matter, the law is clear, information must be released to the prescribed office holder seeking it. It is not a negotiation, and a CEO has no power to withhold information.

The City of Joondalup Governance Framework is a classic example of how the system gets warped:

*“One of the areas that can cause issues for Elected Members is their ability to access information held by the City. Section 5.92 of the Act provides that an Elected Member can have access to any information held by the City that is relevant to the performance of their functions under the Act or any other written law.*

*However, this provision does not give an Elected Member an automatic right to have access to all records held by the City as any information must be relevant to the performance of an Elected Member’s role.*

*In this respect requests for information held by the City are to be referred to the CEO who is to determine if the information is to be released, on the basis that he or she is satisfied that the requested information is relevant to the Elected Members’ role and functions.*

*Notwithstanding, section 5.96 of the Act provides that if any person can inspect certain information then Elected Members may also request a copy of that information. An Elected Member is also entitled to be given access to records that are accessible to other persons under the Freedom of Information Act 1992.”*

s 5.92 does give an elected member an automatic right to information and what the City of Joondalup has done is insert their CEO between an elected member and their lawful right to access information.

The LGA provisions contained in s 2.10 describe the role of a councillor and anything within that ambit is available to an elected member under s 5.92. For example, s 2.10 (a) says a councillor: “...represents the interests of electors, ratepayers and residents of the district.” I cannot think of any information a local government could have that did not fall under the scope of that sub clause alone.

But if that is not enough, s 2.10 (c) makes anything that “*facilitates communication between the community and council*” available and (d) makes anything related to the councillor’s participation “*in the local government’s decision-making processes at council and committee meetings*” available.

After that there should not be much information left in a local government that a councillor cannot lawfully access, but if there is, s 5.92 (2) allows access to pretty much anything related to any contract, either in place or proposed, and the little information that falls outside all those parameters is probably releasable under the FOI Act, which also means that a councillor can access it without the need to trigger the FOI processes.

Conversely, there are no legislative or regulatory provisions empowering a CEO to not release information; s 5.41 (h) and (b) require the opposite, they say a CEO is to:

*“ensure that records and documents of the local government are properly kept for the purposes of this Act and any other written law”*

*“ensure that advice and information is available to the council so that informed decisions can be made”*

It is worth noting that LGA s 5.93 and the Local Government (Rules of Conduct) Regulations 1996 Clause 6, both place restrictions on, and describe offences for, the misuse of information released. It is perfectly sound law making for restrictive and punitive provisions to be included in an act of this kind; however, it is important to recognise that the law is only breached if someone does misuse information provided to them. There is no pre-emptive legislated authority allowing administrators to block the release of information to a councillor on the suspicion that they may misuse it.

The release of information to councils and councillors was raised in the report of the Select Committee in their Finding 30 which said:

*“There is a perception that chief executive officers are able to determine council member requests for information under s 5.92 of the Local Government Act 1995 to suit their own self-interest, and use the governance/operational distinction as a ‘shield’ against council members’ legitimate requests for information.”*

Unfortunately, the government only responded to committee recommendations, so no official comment was made.



The effect of this proposal is a return to pre-FOI days where, unless information is prescribed in an agreement as being releasable, it will be deemed that it is not to be released to an elected representative. Talking about releasing information, the Royal Commission into the Commercial Activities of Government said:

*“As the Commission has emphasised, accountability can only be exacted where those whose responsibility it is to call government to account are themselves possessed of, or are able to obtain, the information necessary to make considered judgments. Information is the key to accountability.”*

The crucial question raised by this part is how is it possible for an elected governing body to oversight its CEO and hold them accountable when that person is granted administrative protection from releasing damaging information?

This is another important proposal that weakens accountability, oversight, transparency, and good governance. It is a provision should be replaced with a section creating offences and penalties when CEOs and administrations:

- Provide misleading or inaccurate advice; or
- provide advice containing serious flaws; or
- provide advice with important omissions; or
- do not release information in a timely and appropriate manner; or
- provide incomplete advice; or
- selectively release information.

This proposal:

- places unfettered veto power in the hands of bureaucrats; and
- restricts decision makers’ access to information; and
- returns information access to pre-FOI processes; and
- should not be proceeded with; and
- does not place any obligation on CEOs to release information to decision makers; and
- does not created offences and penalties for non-conformity/compliance by CEOs.

This proposal is a retrograde step that should not be proceeded with.

#### **5.4 SUPERANNUATION CONTRIBUTIONS FOR ELECTED MEMBERS**

This matter should not be in this package as it should be determined by the state Salaries and Allowances Tribunal.

#### **5.5 EDUCATION ALLOWANCES**

This matter should not be in this package as it should be determined by the state Salaries and Allowances Tribunal.

#### **5.6 CARETAKER PERIOD**

This is a good proposal that should be implemented without delay.

## 5.7 REMOVE WALGA FROM THE ACT

WALGA is not a local government, it has no regulatory powers or authority over Councils, and it does not exist to protect the public interest. It is a legislated monopoly that is charged by s 3(d) of its constitution to “*represent the views of the Association to the State and Federal Governments on financial, legislative, administration and policy matters*”.

Please note that is not the views of local government per se, it is the views of the Association that must come forward from this body. These views are not necessarily endorsed by local governments, and some local governments may have never seen what is being put forward in their names. Interestingly these proposals do not recommend or outline any detail on this matter; it is pointed out that the “expert” panel made its recommendation and provides the sole justification of:

*“Separating WALGA out of the Act will provide clarity that WALGA is not a State Government entity.”*

It is perplexing that no other changes are advocated, making it difficult to understand what this part really means. The proposal is silent on the option of legislating to continue WALGA’s monopoly status under a separate act. If this is to be the case, it should be vigorously opposed.

However, what is not addressed by this proposal is whether WALGA’s monopoly status as the only body with the authority “*...to speak on behalf of Local Government in Western Australia*” should be reinstated in another law; if this is to be the case it should be vigorously opposed.

WALGA claims to be the peak body for local government in WA; but none of the state’s other peak bodies (e.g. the Chamber of Minerals and Energy or the Chamber of Commerce and Industry) have legislative protection or comfort; so why does WALGA need it? The answer is that it does not, and as it made clear in evidence to the Select Committee on 3 August 2020 even WALGA agrees that to be the case, they said:

*“Mr BROWN: WALGA does not need to be constituted under the Local Government Act as long as WALGA is mentioned in the act to provide the preferred supplier service and the insurance service, because they are the critical things that WALGA provides to the sector.”*

In its response to these proposals WALGA reinforced their desire for their business arms to be legislatively protected, they said:

*“It is important to the Local Government sector that the provisions relating to the mutual self-insurance scheme and tender exempt prequalified supply panels remain in the Act and are not affected by this proposal.”*

Recommendation 36 of the Select Committee said:

*“The Western Australian Local Government Association needs not and should not be constituted under the Local Government Act 1995, or any new local government Act.”*

The “expert” panel however backed both horses, it said:

*“In relation to WALGA, the Panel recommends:*

- (a) WALGA not be constituted under the new Act;*
- (b) A transition period is provided to ensure continuity in operations of WALGA while it is re-formed under other legislation; and*
- (c) Recognition of WALGA's Preferred Supplier Program and mutual insurance coverage in the legislation should be accompanied by appropriate oversight measures, including auditing."*

Point (a) of that recommendation has been adopted in these proposals.

Point (b) of that recommendation is redundant; and I suggest that any new act will be years in drafting and passing through Parliament so there is no need to provide any transitional time. If such a rich and powerful organisation as WALGA cannot arrange its own incorporation within that time, it should not be in business.

Point (c) relates to the preferred supplier program and the insurance and begs the question of why legislated monopoly protection is required for them?

There is no public evidence to show that either of these programs provide the public with any value for money; the owners and partners say that they do, but there is no independently verifiable public evidence to demonstrate that is so. In both cases markets are not tested and there is no public accountability or public auditing; notwithstanding that both these protected businesses expend public funds.

Public obligations applicable to those accessing public funds was addressed by the WA Royal Commission into Commercial Activities of Government who said:

*"Members of statutory authorities with very significant funds subject to their control seemed to be unaware of, or else indifferent to, their legal and public duties."*

And

*"The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public."*

And

*"All public sector bodies, programmes and activities involving any use of public resources, be the subject of audit by the Auditor General."*

If an organisation cannot adequately report on its use of public funds, it should not be allowed to access them and in this case, the Select Committee told us the public funds involved are significant:

*"WALGA's 2019 annual report indicates that for the financial year ended 31 May 2019 it received:*

- *\$2,273,786 in membership fees*

- \$2,047,400 in fee for service subscriptions including associate membership subscriptions, procurement services, employee relations, tax and financial services, environmental services, and emergency management
- \$10,655,856 in income from other services including insurance, the PSP, local government events including conventions and seminars, training, and procurement
- \$1,615,522 in other income.”

That is an annual total of \$16,592,564 in public funds that are not audited by independent public officers. Finding 53 of the Select Committee addressed the issue of the unaccountability of WALGA, they said:

*“Given the significant revenue from public funds that the Western Australian Local Government Association receives through fees and subscriptions paid by local government members, there is value in the Office of the Auditor General undertaking annual audits of WALGA.”*

WALGA’s Preferred Supplier Program and insurance business, are both protected by the LGA and the Select Committee advised that for the 2018-19 financial year the expenditure in the Preferred Supplier contracts was a staggering \$351,979,031. WALGA received \$4,283,471 as contract management fees. I know of no other public expenditure of this magnitude that is not publicly audited and there is no reason why this should not be either. On these matters the “expert” panel said

*“The Panel saw merit in the sector being able to use its aggregated buying power through use of WALGA’s preferred supplier program and their mutual insurance coverage. Recognition of these initiatives in the legislation should be accompanied by a power for the Auditor General to conduct regular audits of these programs and related processes.”*

Business ventures should not be given legislative protection and the Select Committee addressed these matters and, while making no recommendations, they made two significant findings:

*“Finding 54 - There is value in the Office of the Auditor General undertaking annual audits of the Preferred Supplier Program”*

And

*“Finding 60 – There is value in the Office of the Auditor General undertaking annual audits of the Local Government Insurances mutual scheme.”*

WALGA is not opposed to the Auditor General auditing their affairs; when asked about it in evidence to the Select Committee, WALGA CEO, Nick Sloan, answered:

*“We do not have a view either way about whether it should or should not be the responsibility of the Auditor General, and if that was a decision that was taken at some point in the future, then I have a level of confidence about the rigour that we have in place in our own processes that that would not be problematic.”*

However, the issue is complicated, the Office of the Auditor General has advised me that:

*“I note the findings of the Select Committee and the Local Government Review Panel reports, both of which found merit in the OAG having power to audit WALGA. However, until such powers are explicit and agreed, I remain wary of over-stepping my legislative mandate.*

*I will consult with the Public Accounts Committee and the Estimates and Financial Operations Committee in the next Parliament to seek greater clarity around Parliament’s intended position on the OAG’s remit as it pertains to WALGA. In the interim, my Office will maintain dialogue with WALGA regarding our operations and remain open to undertaking audits by arrangement under s 22 of the AG Act.”*

s 22 of the Auditor General Act 2006 says that the Auditor General:

*“...may enter into an arrangement with any person or body —*

*(a) to carry out an audit for or in relation to the person or body; or*

*(b) to provide services to a person or body that are of a kind commonly performed by auditors.”*

The deficiency of these proposals over these matters shows clearly that those who could instantly correct this deficiency in public accountability. i.e., the Minister and the Department have remained silent on the auditing public funds used by WALGA. The Minister, his office and the department have all been advised of the concerns of the Auditor General and have taken no corrective action.

The WALGA procurement processes are not publicly monitored for their effectiveness, and it should not receive legislative comfort or protection in any form but should still be required to be regularly audited by the Auditor General. As WALGA has expressed no opposition to such an audit it should not be difficult for the government to use its close relationship with its official partner (WALGA) and ensure such an arrangement is agreed between WALGA and the Auditor General.



WALGA is not entitled to expect these legislated monopolies, the lack of transparency and public accountability continue, and the Government should ensure they do not.

Not only are these proposals deficient in that they do not address the reporting and transparency that is required of public funds used by WALGA, but I also reiterate that the Minister, his office, and the department have all been advised of the concerns of the Auditor General and none of those office holders have taken any remedial action.

## **THEME #6 – IMPROVED FINANCIAL MANAGEMENT AND REPORTING**

*“When we are planning for posterity, we ought to remember that virtue is not hereditary.” Thomas Paine*

### **6.1 MODEL FINANCIAL STATEMENTS AND TIERED FINANCIAL REPORTING**

There is little point in reiterating all that has been said already about the tiered approach being a mechanism for avoiding dealing with the structural reform of local government, but it remains the driver for changes like this one. It is interesting to note the propaganda that the smaller local governments are all isolated/country shires is perpetuated in the examples given as Sandstone (4), Wiluna (4), Dalwallinu (3) however Cottesloe (3), Bassendean (3) Claremont (3) and other metropolitan local governments are not used.

The lack of detail and information renders this very important part of the review irrelevant.



*"Remember, 'accounting' and 'accountability': nothing in common."*

## 6.2 SIMPLER STRATEGIC AND FINANCIAL PLANNING

The first dot point in this part starts with a statement that having “*clear information about the finances of local government is an important part of enabling informed public and ratepayer engagement and input to decision-making*”, and then it removes requirements for public and ratepayer engagement.

Currently the directions for local government are set through the strategic planning processes and earlier submissions have addressed issues relating to this system; however, the current legislated provisions are simple, clear, and functional, s 5.56 says:

*(1) A local government is to plan for the future of the district.*

*(2) A local government is to ensure that plans made under subsection (1) are in accordance with any regulations made about planning for the future of the district.*

There is no need to change that provision.

The current LGA and regulatory provisions make the strategic community plan the overarching document that guides local governments budgeting and operations. It is supplemented by a requirement for corporate business plans; finances are addressed through a long-term financial plan and are funded by annual budgets with that performance being reviewed annually. However, what is proposed replaces that system with:

*“Simplified Council Plans that replace existing Strategic Community Plans and set high-level objectives, with a new plan required at least every eight years. These will be short-form plans, with a template available from the DLGSC”*

This proposal transfers strategic planning authority away from the communities and local governments and places drafting power in the hands of unelected bureaucrats in the department. It also completely reverses the directions set by the “expert” panel that:

*“Improved IPR, clearly positioned as the centrepiece of local governments’ operations and linking strategic and corporate planning, regional cooperation,*

*community engagement, financial management, service delivery and monitoring and reporting of outcomes.”*

Specifically, the “experts” recommended:

36. *“The Panel recommends the following IPR Principles are included in the new Act:*
- (a) Councils plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services to meet the diverse needs of the local community;*
  - (b) Strategic planning identifies and incorporates, where appropriate, regional, State and Federal objectives and strategies concerning the economic, social, physical and environmental development and management of the community;*
  - (c) Strategic planning addresses the community’s vision;*
  - (d) Strategic planning takes into account the resources needed for effective implementation;*
  - (e) Strategic planning identifies and addresses the risks to effective implementation; and*
  - (f) Strategic planning is a key accountability tool that provides for ongoing monitoring of progress and regular reviews to identify and address changing circumstances.*
37. *The Panel recommends:*
- (a) IPR be given greater prominence in the new Act as the centrepiece of ‘smart’ planning and service delivery.*
  - (b) The new Local Government Commission and the department should take steps to improve understanding and skills across the sector to ensure consistent implementation of IPR requirements.*
  - (c) IPR provisions in the Act should be expanded to include the issues currently covered in the regulations (suitably updated in accordance with these recommendations).*
  - (d) IPR provisions and guidelines should be amended to, amongst other things –*
    - (i) Highlight the central goal of advancing community well-being (economic, social, cultural and environmental).*
    - (ii) Replace the current requirement for a Strategic Community Plan with a more flexible framework for ‘Community Strategies’.*
    - (iii) Reframe Corporate Business Plans as broader ‘Council Plans’ prepared by each incoming council.*
    - (iv) Mandate deliberative community engagement in the preparation of both Community Strategies and Council Plans.*
    - (v) Require a ‘regional issues and priorities’ section within Council Plans, to be prepared in consultation with neighbouring/nearby local governments.*
  - (e) Provision should be made for a baseline reporting system as part of the IPR framework, and local governments should be required over time to report*



- against a wider range of performance measures covering financial management, service delivery, governance and community wellbeing.*
- (f) *Annual reports should include a statement of performance against the objectives, programs and projects set out in Community Strategies and Council Plans.*
  - (g) *The Audit, Risk and Improvement Committee (see Recommendations 53 and 54) should monitor the local government's performance in implementing the IPR framework, including compliance with relevant statutory obligations, and report its assessment to the community (for example, as an addendum to the council's annual report and/or as a statement to the Annual Community Meeting proposed in Recommendation 35).*
  - (h) *That all IPR plans be reviewed every four years (to align with the new election cycle), two years or one year depending on the plan."*

All of that is reversed by these proposals but of far greater concern is that authority and responsibility for forward planning is transferred away from the community onto the council.

There is no indication of, or expressed requirement for, any community involvement and these "Council Plans" which will set "high level objectives" and be required every eight years; why that timeframe is chosen is not explained and conflicts with other recommendations. The proposed plans will be "short-form plans", which indicates the most likely outcome is a collection of rhetorical statements and it is not clear how, or even if, this new process will work.

This proposal further disenfranchises an already disengaged community and should not be proceeded with.

The next dot point in this part addresses what it calls "Simplified Asset Management Plans"; there is no supporting information and there is no reason why asset management should be shifted out of the corporate business planning processes and into a stand-alone plan. It is not even clear if a corporate business plan will still be required.

The next dot point in this part addresses what it calls "Simplified Long Term Financial Plans", which again is lacking in detail, is missing an explanation of any link between it and the new "Council Plans". This lack of detail and context makes it impossible to make any serious comment on the proposal.

The next dot point in this part addresses what it calls a "Rates and Revenue Policy" that will be dealt with at item 6.3.

The next dot point in this part addresses "The use of simple one page Service Proposals and Project Proposals that outline what proposed services or initiatives will cost.....". While this may be a useful initiative, it is not a legislative requirement; and again, there is so little information provided that it is difficult to make any kind of judgement on it.

This section lacks detail, and what detail there is transfers authority away from the community and attempts to simplify what are, and should be, complex issues. The proposals are undercooked and should not be proceeded with.

### **6.3 RATES AND REVENUE POLICY**

This government document disingenuously advises that “*the Local Government Panel Report included this recommendation*”. That is the report from the group I call the “expert” panel who recommended:

*“That local governments should be able to set reasonable fees and charges according to a rating and revenue strategy, with the oversight of the Audit, Risk and Improvement Committee.”*

The obvious and significant difference between what the “experts” recommended and what the minister is proposing is that the former requires a rating and revenue strategy in order that fees and charges can be set (on a cost recovery basis) but the minister is proposing a blank cheque on the setting of rates. These are two fundamentally different matters.

The “experts” also recommended oversight by strengthened audit processes but that important step is not included in these proposals. The other major failing of this proposal is that, even if it is properly prepared and well executed it is not binding on a council who are, and should be, free to set their annual budget and rates at whatever level they determine necessary for whatever they choose to do.

This proposal adopts only part of a recommendation put forward; ignores oversight and should not be included in any new act.

#### **6.4 MONTHLY REPORTING OF CREDIT CARD STATEMENTS**

This is not a legislative matter; it is at best one for regulation but is more properly one that should be handled by council policy and mandated reporting and departmental oversight.

#### **6.5 AMENDED FINANCIAL RATIOS**

This is not a legislative matter; it is at best a matter for regulation.

#### **6.6 AUDIT COMMITTEES**

This is a crucial area of governance that has not been adequately addressed by these proposals. Having said that the idea of an independent chair of an audit committee has merit, however these proposals end with that step. The “expert” panel also called for an independent chair but went significantly further in strengthening the independent oversight and auditing of local governments, they said:

*“53. The Panel recommends the role of audit committees be expanded to become Internal Audit, Risk and Improvement Committees and:*

- 1. The majority of the Committee members, including the Chair, should be independent of the local government and should be drawn from a suitably qualified panel.*
- 2. To address the impost on small local governments, the committee could be established on a regional basis.*

*54. The Panel recommends the main roles of the Audit, Risk and Improvement Committee should include:*

1. *Developing an audit plan which focuses on compliance, risk (including procurement), financial management, fraud control, governance and delivery of the Council Plans;*
2. *Identifying continuous improvement opportunities and monitoring programs and projects in this area;*
3. *Conducting the mandatory internal audits as outlined in the audit plan; and*
4. *Providing advice to the council in relation to these matters.”*

Whilst those recommendations were light on for detail, they offered significantly better prospects for improved accountability and transparency than do the minister’s proposals. This proposal is incomplete and requires significantly more work. The very least that should be expected is that this part be extended to include the recommendations of the “expert” panel.

#### **6.7 BUILDING UPGRADE FINANCE**

No comment.

#### **6.8 COST OF WASTE SERVICES TO BE SPECIFIED ON RATES NOTICES**

This is not a legislative matter; it is at best one for regulation.

#### **FINAL**

The WA Royal Commission into the Commercial Activities of Government said:

*Three goals can be identified as necessary to safeguard the credibility of our democracy and to provide an acceptable foundation for public trust and confidence in our system of government. These goals are:*

- (a) government must be conducted openly; and*
- (b) public officials and agencies must be made accountable for their actions; and*
- (c) there must be integrity both in the processes of government and in the conduct to be expected of public officials.*

These rather naïve proposals acquit none of those goals; the review process has been badly bungled and for local government reform to be achieved in the public interest:

- That review process needs to be reskilled and restarted, and
- the long-awaited green bill needs to be produced, and
- the local government department must be properly funded, and
- significant training is needed at ministerial, departmental, and political levels, and
- funding is required to allow for ongoing and thorough public consultation, and
- the local government partnership with the government must be ended.

Or alternatively:

