City of Melville Administration Submission to Select Committee into Local Government

The City of Melville appreciates the opportunity to provide its views to the WA Parliamentary Select Committee into Local Government. Please note that the following comments are the views of the Administration of the City and have not been endorsed by Council.

In general, the City strongly supports the positions put forward by WALGA in its submission, and endorses the research and analysis that underlie those positions. This submission will not repeat the points made by WALGA. It is intended to supplement that submission with observations and suggestions based on the City of Melville's own recent experience. It specifically covers issues that we believe have and will continue to have significant impacts on local government operational effectiveness.

(a) Whether the Local Government Act 1995 and related legislation is generally suitable in scope, construction and application

This issue needs to be considered in the context of the relationship between local government and the community. The role of local government has grown substantially from its old "Road Board" origins. It now provides a wide range of services and regulates multiple activities, and is itself heavily regulated by the State.

One of the vulnerabilities of local government is that it is the closest tier of government to the lives of individual people. Its decisions affect their homes, their lifestyles and their neighbourhoods. Their elected members live in those same neighbourhoods and residents may often see them informally. Many people feel they have a much closer personal relationship with their local government than they do with the state or national governments. This can lead to expectations by some individuals that their views should be given disproportionate weight in local government decisions.

Most people accept that their local government must act in the best interests of the community as a whole, and that occasionally this may mean that some decisions may be unfavourable to some individuals. However, there will always be a few individuals who believe that their personal demands should be given precedence even if this is to the detriment of others, or that they should not be expected to comply with the same legal requirements as everyone else. Some of these people react with outrage and fury when the local government persists in acting impartially and does not accede to their demands for favoured treatment.

In recent years, a very small minority of such people have chosen to vigorously pursue their grievances individually or in like-minded groups well beyond established review mechanisms, to try to force their local government to yield to their demands and exact retribution from individuals for decisions with which they disagree.

Typically, they use social media and widely broadcast emails to cast themselves as victims of an uncaring local government, threaten and demonise individual councillors or staff members, mis-state events and communications to skew the narrative in their favour and seek to enlist State regulatory and complaint agencies, State and national Members of Parliament and the media in their cause. Some use direct threats and unsubstantiated allegations to attempt to influence or reverse decisions. This growing trend of an aggressive sense of entitlement and associated unreasonable behaviour is not confined to Western Australia, but is also being experienced by jurisdictions elsewhere.

Affected local governments have found that dealing with such people diverts significant staff time and other resources from other priorities. Unreasonable conduct by such people negatively impacts the health and morale of staff exposed to their conduct, which has implications for local government obligations under the Occupational Safety and Health Act.

Current legislation in Western Australia does not provide guidance, protection or management tools for local governments in dealing with this changing environment, or the negative impacts it can have on targeted local government councillors and officers.

Despite this unfortunate trend, local government councillors and staff in Western Australia are overwhelmingly professional, objective, hard-working and committed to furthering the public interest. The City joins WALGA in paying tribute to Western Australia's 1,222 Elected Members who have been willing to step up and take a leadership role in their communities, often in a challenging political role in the public realm, and to the 22,000 local government officers who support them.

(b) The scope of activities of Local Governments

Land Use Planning

State planning decisions must generally be implemented by local governments. The State, through the WA Planning Commission, imposes obligations on local governments to implement numerous State planning policies to achieve broader State objectives. The State does not generally take the lead in explaining or "selling" the benefits of these policies to the community, or in addressing the associated risks.

This means that local governments bear the brunt of community dissatisfaction with unpopular State planning policies and directions. Obvious examples in the Perth metropolitan area are the State's infill and residential density targets, which from the perspective of many existing residents are changing the character of their neighbourhoods – and not for the better.

Local governments are merely complying with imposed State policies. In some cases their concerns on behalf of the community relating to specific developments are over-ruled through Development Approval Panels. Despite this, they are left to deal with community anger and frustration over the real and perceived disadvantages of the results.

Within the constraints of the State Planning Framework, Western Australian local governments are providing effective planning services for their communities, but the primacy of State requirements needs to be recognised when the community judges their activities.

Other Services

Some services, such as public health control or swimming pool inspections, are legislated responsibilities for local governments, although they may be undertaken with in-house staff or contractors.

Other services are discretionary, provided because the local community expresses a desire for them or they are needed to provide a quality of life in the local government's district equivalent to that enjoyed elsewhere. In some local government districts, it is not feasible for these services to be provided by the private sector, community groups or other tiers of government. Service delivery models for these services may include in-house staff, paid contractors or subsidised community groups.

Further guidance about when and under what conditions a local government might directly provide such services and the merits of different service and funding models in use/available, would be helpful, including consideration of National Competition Policy and the competitive neutrality principle. The issue of cost-shifting between tiers of government needs to be explicitly addressed in funding arrangements.

(c) The role of the Department of State administering the Local Government Act 1995 and related legislation

The role of the Department of Local Government, Sport and Cultural Industries has become increasingly vague and ill-defined, and needs to be clarified, particularly whether it still has a local government "capacity building" element in its mandate.

For the benefit of both the Department and the local government sector, the State needs to explicitly clarify the Department's future responsibilities and priorities, and what expectations local governments are entitled to hold about their relationship with the Department.

If the Department's role is to be limited to compliance monitoring and regulatory enforcement, then this needs to be made clear, and other sources of advice and capacity building for the sector (whether by strengthening the legislative role of WALGA or some other means) need to be identified. If the State believes the Department also has a continuing role in providing practical advice and capacity building, then its staffing, financial resources, business plans and corporate culture need to reflect this.

For example, the Department has become reluctant to provide direct advice on the interpretation of its own legislation, or to share (de-identified) experiences of other local governments or the Department itself with similar matters to that for which advice is being sought. A standard response is "get your own legal advice". This results in significant local government expenditure on legal fees for matters that may have arisen multiple times across the sector. Not only is this duplication of effort, but leads inevitably to inconsistency across the sector as local governments act on different legal interpretations.

While individual officers usually do their best to help, the Department's capacity to provide practical advice is hampered by the reality that very few of its officers have any direct previous operational or managerial experience in a local government. By necessity, therefore, their perspective tends to be academic rather than practical as they have no lived experience in balancing the complexities or assessing the risks that local governments deal with daily. A system of reciprocal secondments, or inclusion of actual local government experience in Departmental essential selection criteria could be considered if the State regards the Department as having an ongoing role in advice, support and mentoring.

There is considerable unease among local governments about the operation of the Local Government Standards Panel. Findings and decisions appear to be inconsistent, and the strength of the evidence required to meet the standard of proof is considered inappropriate for the matters at issue (and it is noted that unlike the Standards Panel, the State Administrative Tribunal does not apply the Briginshaw principle to minor breach matters). This has resulted in the Panel appearing to condone inappropriate and destructive councillor behaviour with serious negative consequences for the affected local government.

(d) The role of Elected Members and Chief Executive Officers/employees and whether these are clearly defined, delineated, understood and accepted

Role of Elected Members

A recurring issue for local government effectiveness is the expectations that councillors have of their role. This is particularly the case for new councillors, but there are many experienced councillors who still struggle with it. Put simply: councillors are representatives of the community, not lobbyists for special interest groups or advocates for the personal interests of certain individuals. This is a distinction that not all councillors appreciate.

Councillors can be very vulnerable to the expectations of individuals and groups that financially (or otherwise) supported their campaign, with the anticipation that "their man/woman on the council" would now fight for their cause(s). Those groups may seek to put pressure on the councillor through threats or intimidation to vote in the way they desire, and seek retribution if this does not occur.

Any councillor who campaigns on a platform that he or she will support or oppose a particular matter is placed in a difficult position when they are actually required to assess that matter impartially based on the evidence available – some of which they may have been ignorant of when making their campaign promise.

A councillor who chooses to ignore evidence in order to vote consistently with their pre-election statements can rightly be perceived as not acting impartially due to a pre-existing interest, yet they will be criticised by some sections of the community if they do not vote that way and seen as "breaking their election promises". The current requirements for declaration of interests do not cover previous statements of bias on a matter (or bias on the basis of religious or political beliefs).

A councillor's paramount objective must always be the overall net public interest of the community that the local government serves. A councillor who chooses to act as an advocate for selected individuals or groups, and against the interests of other individuals or groups or the community at large, is no longer acting as a representative of the community but as a lobbyist-with-voting-rights.

State and national politicians have similar conflicts and must manage similar expectations from pre-election supporters, but the party system provides a protective buffer that is not available to local government councillors.

The City does not see an easy solution to this dilemma – it is an inherent element of local government and an essential difference between elected members at local and State levels that the Committee is urged to consider. Greater legislative protection for councillors from improper influence and a more stringent approach to transparency of electoral gifts (whether invited or imposed) would be a starting point.

Role of the Chief Executive Officer

The City takes this opportunity to raise a systemic issue concerning the relationship between Elected Members and the Chief Executive Officer. This has been a key concern in local governments for some time.

In local government, the council is the CEO's employer. Council members, acting collectively as the council, appoint the CEO, manage the CEO's performance and decide whether to terminate or renew the CEO's contract.

Among other responsibilities, the CEO is responsible for the legislative compliance of the local government, including the council and council members, and under some circumstances is legally obliged to report suspected non-compliance or misconduct of individual council members to State agencies. The CEO also has responsibility, under the Occupational Safety and Health Act, for protecting staff from hazards, including those arising from interference or bullying by council members.

This means that a local government CEO is likely, on occasions, to have to tell some council members that they can't do something they want to do, or must do something they don't want to do, or to cease doing something they want to continue doing. A CEO may have no choice but to report a council member for non-compliance, such as failure to provide annual returns. This leads to a fundamental conflict in the relationship between the CEO and the council members who are collectively his/her employers. Some council members perceive the CEO's actions in complying with the law as being insubordinate.

These same council members will then vote on the CEO's performance appraisal or contract renewal. There is no legal or structural protection for the CEO from bias in these decisions by council members who resent having been thwarted or reported by the CEO in the course of the CEO's duties. Activist groups have also overtly lobbied sympathetic council members to remove a CEO seen as standing in the way of the group's ambitions.

No amount of training or guidelines can remove this threat, which provides a strong incentive for timidity in CEOs when dealing with council members' non-compliance or misconduct or maintaining impartiality in the face of fierce lobbying for a particular course of action.

CEOs in the State public service or the private sector do not have this inherent relational conflict because in the former case, the employer is the independent Public Sector Commissioner and in the latter case the Company Secretary deals with Board compliance matters.

It is to the credit of local government CEOs in Western Australia that they act with integrity on enforcing council member compliance and maintaining a focus on community interest even when it may threaten their career. It is a poor reflection on the sector and the failure of the State legislation to protect CEOs against this obvious risk, that a significant number have in fact had their careers, reputations and health ruined by doing so.

This is a systemic flaw in the framework of local government, and the Select Committee is urged to consider a more robust mechanism of protecting local government CEOs through the introduction of an independent oversight mechanism for performance appraisals, and a requirement for an independent body, such as the Public Sector Commissioner, to approve the termination or non-renewal of a local government CEO's contract.

(e) The funding and financial management of Local Governments

The City supports WALGA's points on the desirability of greater flexibility and autonomy for local governments in setting fees and charges. However, we note that the setting of fees and charges can be complex, with not only legal restrictions, but political considerations and an understanding of the community's capacity to pay.

The City acknowledges that empowering local governments to set their own fees and charges may eventually lead to large variations between local government areas and disadvantage some parts of the community who will pay very much more for a service than others. This could be mitigated by accepting workable boundaries around local government fee-setting processes to protect ratepayers and avoid perceived inequity.

For example, fee-setting powers could be subject to legislated principles such as demonstrated efficient cost reflectivity, transparency and prohibition of hidden cross-subsidies (such as all concessions being published and justified on public interest grounds). To ensure public confidence, the fee-setting processes of local governments could be subject to audit by the Auditor General.

(f) Other related matters

Occupational safety and health coverage of local government elected members

While the Commonwealth Fair Work Act specifically recognises local government councillors as workers, the WA Occupational Safety and Health Act is based on the existence of employment contracts. This means that local government councillors are not covered by the protections of the Act or by workers' compensation provisions, although their activities very clearly constitute work for reward.

The City appreciates that rectifying this anomaly may be a fundamental shift in the basis of the Act. However, it is unreasonable to deny local government councillors some form of protection in the workplace.

Protecting the integrity of local government decision making

The WALGA submission notes the trend of increasingly extreme behaviour among dissatisfied individuals and groups when local governments do not accede to their demands to elevate private interests above the public interest.

The Local Government Act is focused on protecting the community from failures of governance or misconduct by local government councillors and employees. However, it does not recognise or address the threat to local government effectiveness posed by the changing relationship between the community and the local government, and by the increasing power of special-interest activist groups and individuals.

The Local Government Act currently offers no protection to local governments from the impacts of unreasonable conduct by external parties, including false information, unsubstantiated allegations/complaints and improper influence.

The City urges the Committee to consider the merits and practicality of better balancing the Local Government Act and protecting the integrity of local government decision-making from improper influence.

Specifically, we would suggest that it be made an offence for any person to:

- (i) Provide false and/or misleading information to a local government in relation to a decision being sought (including requests for approvals, petitions and deputations, and complaints against other community members, councillors or employees); or
- (ii) Knowingly provide false or misleading information to a meeting of Council or to an Electors' Special Meeting; or
- (iii) Seek to influence, by means of a threat (including implied threat) or the promise of a reward, the conduct of a local government councillor or employee in their capacity as a local government councillor or employee.

Electors' Special Meetings

There are two identifiable issues associated with Electors' Special Meetings as they are currently presented in the Act. The first refers to the frequency with which Electors' Special Meetings may be called on the same issue, and the second relates to the ease with which these meetings may be called especially in larger local government districts.

While it is agreed that Electors' Special Meetings are appropriate to be called on single issues, it is not an appropriate use of these meetings when they are exploited by a special interest group as a means to continually bring an issue before the Council that may have already been resolved, including through external review processes. These Electors' Special Meetings may be used in conjunction with public question time and public address and deputations at Ordinary Council Meetings on the same or a similar issue.

Secondly, as local governments have become larger in population size, the requirements associated with calling such meetings have not similarly changed.

The *Local Government Act 1995* states that –

> *s. 5.28. Electors' special meetings*
> *(1) A special meeting of the electors of a district is to be held on the request of not less than —*
>
> > *(a) 100 electors or 5% of the number of electors — whichever is the lesser number; or*
> > *(b) 1/3 of the number of council members.*
>
> *(2) The request is to specify the matters to be discussed at the meeting and the form or content of the request is to be in accordance with regulations.*
>
> *(3) The request is to be sent to the mayor or president.*
>
> *(4) A special meeting is to be held on a day selected by the mayor or president but not more than 35 days after the day on which he or she received the request.*

It is submitted that the prescribed number of electors to request an Electors' Special Meeting should be based on the actual overall number of electors for the district rather than an attempt under the Act to develop a system that caters for all local governments irrespective of electoral size. It is argued that it is not possible to designate an arbitrary number that may provide an equitable solution for all local governments.

Some local governments may have as few as 900 electors while another may have as many as 142,000 electors. The requirement of 100 electors or 5% of the number of electors whichever is the lesser would equate in the example above to 45 electors and 100 electors (0.07% of eligible electors) respectively, as this is the lesser number, 5% being 7,100 electors. This obliges larger local governments to incur often significant expense at the request of a tiny but determined special interest minority demanding multiple Electors' Special Meetings on the same matter. This consequence does not appear to reflect the intent of the legislative provision; neither does it provide an equitable operation amongst local government districts.

It is suggested that the Act should be amended to state that a Special Meeting of the electors of a district is to be held on the request of not less than 100 electors per 10,000 electors or 5% of the number of electors – whichever is the lesser number. Therefore, in the case of a local government that has under 10,000 electors the number should remain at 100 electors or 5% whichever is the lesser. In local governments that have larger populations, the number should be increased by increments of 100 per every 10,000 electors, which would mean that an Electors' Special Meeting would have the support of at least 1% of the eligible electors in the district. If desired, the number could be capped at 1,000 electors for populations over 100,000.

A further suggested amendment would preclude the calling of an Electors' Special Meeting on the same or significantly similar issue if the matter has been dealt with by an Electors' Special Meeting in the preceding six months. Council would retain the discretion to conduct the meeting if it determined otherwise.

Conclusion

The City of Melville Administration appreciates the Committee's consideration of the above matters. The City's Chief Executive Officer would be happy to address the Committee in person on these or other issues.

(End)