

28 October 2019

The Hon. Stephan Knoll MP
Minister for Transport, Infrastructure and Local Government
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Dear Minister

Re Reforming Local Government in South Australia Discussion Paper (Discussion Paper)

Thank you for the opportunity to comment on your Discussion Paper of 5 August 2019.

Complaints and reports about local government comprise approximately 20% of matters received and assessed by the Office for Public Integrity (OPI). The number of persons including elected members engaged in local government means that local government is overrepresented in complaints and reports.

Over the past six years I have made a number of observations in relation to the local government sector, particularly in relation to the operation of its Codes of Conduct for Council Employees and Elected Members, which I think could be improved. I have raised those issues with the former Minister and in my annual reports.

It follows that Reform Area 1: Stronger Council Member Capacity and Better Conduct is of particular relevance to my office and to the OPI.

Codes of Conduct

I understand that a decision was made to adopt uniform codes of conduct due to the issues and inconsistencies which arose from each council adopting its own. The Code of Conduct for Elected Members was published by the Minister in the Gazette on 29 August 2013 and came into force on that day.

The Code of Conduct in its current form has presented a number of issues which include:

- elected members weaponising the Code of Conduct to make complaints against one another. This has proven to be a lengthy, costly and at times circular process and has arguably detracted from the proper functioning of some elected bodies;
- the duplication of some conduct in Code of Conduct and provisions of the *Local Government Act 1999* (LG Act);
- alleged breaches of the offence provisions under the LG Act (including very minor and/or technical breaches) giving rise to an obligation to report to the OPI on the basis that the matter involves potential corruption in public administration. However the alleged breaches are largely unlikely to be prosecuted;

- the lack of available sanctions when findings of misconduct have been made against an elected member; and
- some elected members' lack of regard to sanctions imposed on them and the inability to enforce those sanctions.

The present Code of Conduct for Local Government Employees is contained in the Local Government (General) (Employee Code of Conduct) Variation Regulations 2018. Those Regulations commenced on 2 April 2018 and varied the previous Code of Conduct for Local Government Employees which was published in accordance with regulation 8A of the Local Government (General) Regulations 2013.

Schedule 2A which contains the present Code of Conduct only refers to gifts and benefits. No other conduct is prescribed. That means that the Code of Conduct is deficient.

As you would be aware, the *Independent Commissioner Against Corruption Act 2012* (ICAC Act) is concerned with the conduct of public officers and the practices, policies and procedures of public authorities in public administration.

Schedule 1 of the ICAC Act prescribes the categories of persons who are public officers and the public authority responsible for such categories of public officers. Those categories of public officer include a member of a local government body and an officer or employee of a local government body. The public authority responsible for those public officers is the relevant local government body.

Section 5 of the ICAC Act states:

- (3) **Misconduct in public administration** means -
- (a) *contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or*
 - (b) *other misconduct of a public officer while acting in his or her capacity as a public officer.*

I think that in the absence of uniform codes of conduct there is the risk that councils will adopt separate codes (which I understand may presently be the case for matters involving council employees), which will create inconsistency and confusion.

Insofar as my office is concerned, the absence of any code of conduct will necessarily place reliance on the second limb of section 5(3) of the ICAC Act when considering conduct which does not constitute a breach of a code of conduct but is otherwise of a kind which is indicative of misconduct. I think that this would present difficulties for public officers in understanding what type of misconduct they are obliged to report to the OPI; for the OPI when assessing a matter; and for a public authority or inquiry agency in investigating and making findings in relation to a matter referred to it by me or the OPI.

I think it is important that the Codes of Conduct for Elected Members and for Council Employees are consistent with each other.

In the case of elected members, I appreciate the need to separate behavioural matters from more serious conduct matters. Behavioural matters should not be included in the Code of Conduct for Elected Members and ought to be dealt with at a council level.

As I have mentioned when the Code of Conduct for Council Employees was amended in 2018 the only issue addressed in relation to employee conduct was gifts and benefits. I think that council employees need to be subject to a uniform code of conduct similar to the *Code of Ethics for the South Australian Public Sector* which must be observed by public sector employees.

It is important that the Codes of Conduct do not include any criminal conduct. The Codes of Conduct should only include conduct that is misconduct and should provide the potential sanction and the means for imposing that sanction. Potential breaches would then be captured by the ICAC Act.

Moreover the Codes of Conduct should not replicate any other conduct that is already prescribed in the LG Act.

Offence provisions

Corruption in public administration for the purposes of the ICAC Act includes any offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer: section 5(1)(c).

If certain conduct by an elected member or council employee amounts to an offence under the LG Act, it therefore constitutes corruption in public administration. Any public officer who reasonably suspects that such conduct has occurred is obliged to report that matter to the OPI in accordance with the Directions and Guidelines I have prepared in accordance with section 20(1) of the ICAC Act.

The OPI must assess whether a matter raises a potential issue of corruption in public administration *that could be the subject of a prosecution* [my emphasis]: section 23(1)(a) of the ICAC Act.

Conduct which may technically raise an offence but which is unlikely to be prosecuted is often instead assessed by the OPI as raising a potential issue of misconduct in public administration and dealt with accordingly.

Should the LG Act prescribe offences there needs to be a body which has responsibility for investigating those matters. In my experience the South Australia Police is not interested in investigating that type of conduct and the Crown is often reluctant to carry out an investigation. Such matters are not usually of the kind that I would investigate. For that reason somebody should be charged with the responsibility to investigate the conduct of that type and, where necessary, to bring a prosecution.

I think it should be the Crown which has similar responsibilities under other legislation such as the *Fisheries Act 2007*.

Council Member Conduct Framework

At the present time the two bodies that can investigate the conduct of elected members are the Ombudsman or the council to which the member has been elected.

It is often inappropriate for a council to investigate the conduct of its members. Where I have referred such a matter to a council to carry out an investigation I am often told in reply that the council is reluctant or ill-equipped to do so (short of engaging a lawyer or consultant). The Ombudsman does not have the resources to investigate all alleged breaches of the Codes of Conduct and the OPI has no investigative functions.

Of the three models proposed in the Discussion Paper I think that one akin to Model 2 would be most appropriate.

I would support the establishment of an independent body or panel, comprising a number of appropriately skilled persons who are appointed by the Governor or the Minister, which has governance responsibilities and which can investigate misconduct and also investigate and make findings of maladministration on the

part of the council. For each council to have its own body or panel may present challenges in terms of finding appropriately skilled persons and it may therefore be preferable to establish one panel or a series of panels for regional councils.

The panels would need to be empowered to provide findings to the relevant council for the council to impose a sanction for proved misconduct when appropriate. They should also have a residual power to impose a sanction when it is deemed necessary rather than to refer the matter back to the particular council.

I think that body or panel should also have the responsibility of investigating misconduct of Chief Executive Officers and senior local government employees who could not be investigated by the council in which they are employed.

I do not think that the body or panel should be able to receive complaints directly from members of the public or public officers but rather should receive matters by way of referral from me, the OPI, the Ombudsman, the council or the Minister.

Any reporting or escalation mechanisms to such a body must not detract from a public officer's individual reporting obligations to the OPI under the ICAC Act.

Complaints or reports received by the council, the OPI or the Ombudsman which are deemed to be trivial, vexatious or frivolous or do not otherwise warrant further action should be assessed as requiring no further action. The complainant should be advised of that assessment and the matter should not be referred to the body or panel for further consideration.

The body or panel must be deemed a public authority for the purposes of the ICAC Act (unless it is declared an inquiry agency which I do not think would be appropriate) to allow for me or the OPI to make a referral directly to such a body or panel for a misconduct or maladministration investigation. This could be facilitated by amending Schedule 1 of the ICAC Act.

I do not agree with the creation of a Commissioner for Local Government.

Other comments

Council member conduct

I agree with the proposition that the presiding member of a council should be given greater power to discipline members during council or committee meetings including the power to order an elected member to leave the chamber for a period of time perhaps not exceeding an hour.

There would need to be a register kept of those kinds of orders made by the presiding member so that errant behaviour could be identified.

There seems to be ongoing uncertainty amongst elected members about what constitutes a conflict of interest and how a conflict of interest ought to be managed. Consequently I support the proposal to simplify the conflict of interest provisions as outlined in the Discussion Paper.

Council member capacity

I have no objection to the role of council members and the role of the principal officer being clarified in the terms proposed.

I am not sure I agree with the suggestion that there should be compulsory education for elected members or that they be subject to continuous development. Councillors are elected by their constituents and those constituents have the right to elect someone who has little or no formal training if those constituents wish to be represented by that person. Members of Parliament are not required to undergo training.

I doubt whether the Remuneration Tribunal would wish to undertake the responsibility of fixing a Chief Executive Officer's remuneration. Perhaps a Chief Executive Officer's remuneration ought to be determined by reference to the rate revenue of the council so that the remuneration can be capped.


I support proposals 1.16 and 1.18 – 1.20 in relation to matters involving a council Chief Executive Officer.

Simpler regulation

I would support any reform that resulted in legislation (including subordinate legislation) being expressed in plain English and without ambiguity.

I am willing to clarify or further discuss any of the above points with you. I would also welcome the opportunity to comment on the draft Local Government Reform Bill.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Bruce Lander', written in a cursive style.

The Hon. Bruce Lander QC

INDEPENDENT COMMISSIONER AGAINST CORRUPTION