

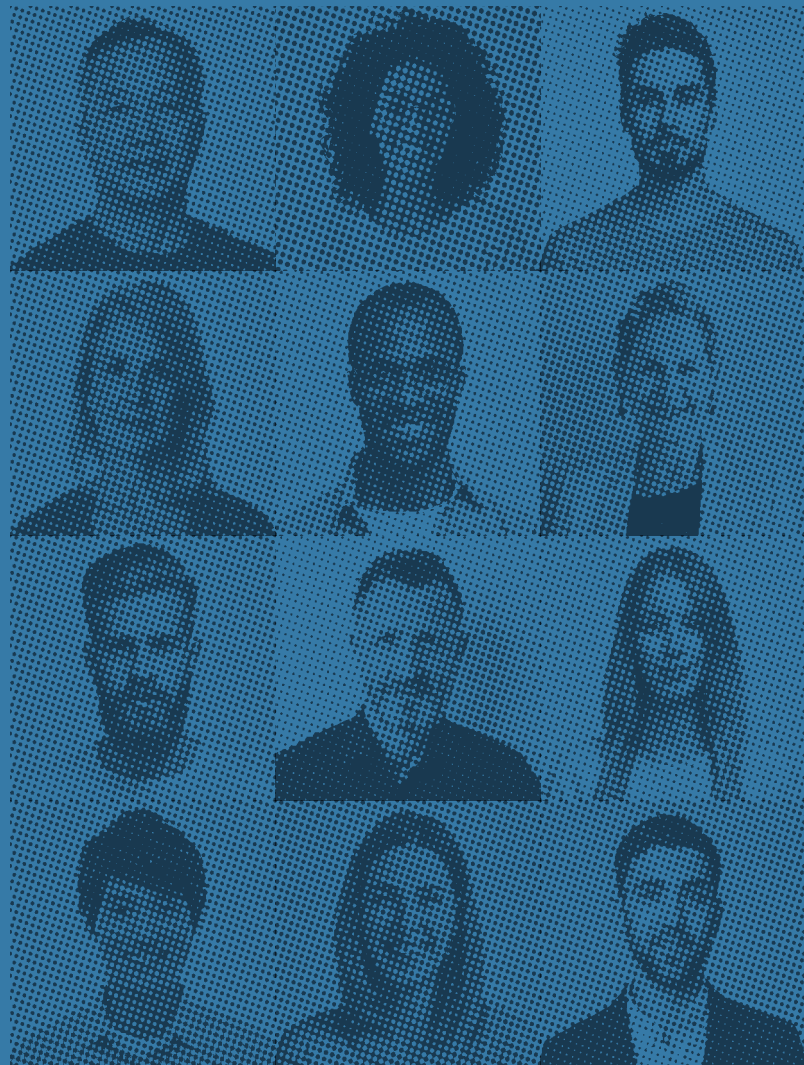


ICAC

Independent Commissioner
Against Corruption
SOUTH AUSTRALIA

Identify, Disclose and Manage:

Conflicts of Interest in Public Administration





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Conflicts of Interest in Public
Administration

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Commissioner's foreword

It is incumbent upon every public officer to identify, disclose and properly manage conflicts of interest.

Unmanaged conflicts of interest can compromise the performance of public officers and erode community confidence in integrity in public administration. Failure to appropriately deal with them creates the risk of misuse of the powers, resources and funds entrusted by the community to public institutions.

This report has been prompted by two significant investigations within a single agency. Conflicts of interest have also been a persistent feature in numerous other ICAC investigations as well as matters referred to agencies for investigation.

My review of all these investigations has convinced me there is good reason to remind all public officers of the need to identify, disclose and manage conflicts of interest. There should be open and regular discussion with public officers about how to deal effectively with conflicts of interest in order to remind them of their obligations.

I hope this report, which is the first of several reports I expect to publish about conflicts of interest, will serve as a useful guide to all public officers in identifying and dealing with such conflicts.



The Honourable Ann Vanstone QC
Independent Commissioner Against Corruption

What is a conflict of interest?

Conflicts of interest arise when the **personal interests** of a public officer or someone close to them **come into conflict** – or could be **perceived as coming into conflict** – with the duties and responsibilities that public officer has.

There is nothing inherently wrong with having a conflict of interest.

All public officers have interests outside their public roles and it is almost inevitable that at some point in a public officer's career a conflict of interest will arise. For many public officers, conflicts of interest will be an ongoing issue.

The mere existence of a conflict of interest is not unethical. But where conflicts of interest are not identified, disclosed and managed, due process is compromised and there is a risk the community will lose confidence in the propriety of public officers, as well as in the impartial functioning of public administration.

At worst, conflicts of interest that remain unidentified, undisclosed and unmanaged can give rise to a suspicion that corrupt conduct has occurred, is occurring, or may occur. Many complaints and reports made to the Office for Public Integrity arise from suspicions of corruption springing from poorly managed conflicts of interest.

Conflicts of interest: The obligations

Conflict of interest obligations vary for different types of public officer. Obligations arise under Acts of Parliament, regulations and codes of conduct. Many public authorities will have specific conflict of interest policies, practices and procedures that apply to their employees, as well as for specific business functions such as recruitment and procurement.¹

Public officers should be aware of the specific statutory, regulatory, policy and procedural obligations that attach to their roles.

Behind all conflict of interest regimes lies a basic set of principles that all public officers should understand. These basic principles underpin the regulatory regimes to manage conflicts of interests. Three fundamental principles arise when it comes to conflicts of interest:

- ▶ identify
- ▶ disclose
- ▶ manage

¹ See Appendix: Various conflict of interest obligations of public officers, pp 14-15.

Conflicts of interest: The principles

Identifying conflicts of interest

Conflicts of interest must be identified before they can be disclosed and managed. Identifying a conflict of interest requires a public officer be aware of their:

- ▶ personal interests
- ▶ public duties and responsibilities
- ▶ conflict or perception of conflict

The personal interests of a public officer can be material or financial interests, as well as non-financial interests, arising from their private life. They can be their own personal interests, or the interests of family, friends or associates. The interests of a business, club, group or association can also comprise a personal interest for a public officer, as can animosities, grievances or biases against other individuals or groups.

The duties and responsibilities of a public officer can be understood widely. They involve the roles, tasks, assignments, and powers given to that public officer by virtue of his or her employment. However, they extend beyond formal task requirements to any power or influence which can be exercised by a public officer.

A public officer's duties and responsibilities must be carried out impartially, without bias and in the community's interest. Public officers must be alive to situations where there may be an actual, perceived or potential connection between their personal interests and their public duties and responsibilities.

Wherever a personal interest conflicts with, or has the potential to influence the performance of a public officer's public duties and responsibilities, a conflict of interest exists.

While public officers have a responsibility to identify their conflicts of interest, it is not solely a decision for the public officer whether a conflict of interest arises. It is not enough for a public officer to regard themselves as not being influenced by their personal interest. A public officer has a conflict of interest when a 'fair and reasonable' person could perceive them as having one.

If a reasonable and fair-minded observer might perceive that a public officer's personal interest could be favoured by exercising their duties and responsibilities, then a conflict of interest exists. Perception is an important consideration when identifying conflicts of interest, and the reasonable person test should always be considered when seeking to identify the existence of conflicts of interest.

Disclosing conflicts of interest

Once a conflict of interest has been identified it must be appropriately disclosed.

The manner in which a disclosure is made will be determined by applicable legislation, regulation and local policies.

When making a disclosure, transparency is the key, and three relevant questions apply. Those questions are **when**, **how** and **what** to disclose?

When?

Conflicts of interest should be disclosed as soon as practicable upon a conflict of interest being identified.

How?

In most cases the disclosure should be made in writing to the public officer's manager or supervisor, or the agency head. Disclosure in writing helps avoid any disputes about the timing and nature of the disclosure.

What?

A disclosure should contain sufficient information to allow for the effective management of the conflict. A disclosure that is incomplete or inaccurate can adversely affect the management of the conflict. A disclosure that is intentionally inaccurate or misleading so as to minimise it or prevent it from being appreciated or understood, could give rise to an allegation of corruption.

Managing conflicts of interest

Once a conflict has been identified and disclosed it must be **managed**.

As a general rule public officers should not solely manage their own conflicts of interest. A public officer who decides to manage their own conflict in the absence of involvement of others, may heighten an observer's suspicion of misbehaviour. Once established, perceptions of bias and unfairness will be difficult to resolve.

The appropriate approach is to involve a more senior public officer in the management of the conflict. While a public officer is ultimately responsible for his or her actions, managing a conflict of interest under the direction of a person in authority reduces the prospect of a loss of objectivity and ensures a more transparent and ethical approach to official duties.

The independent person charged with managing a public officer's conflict of interest should review and assess the written disclosure and prepare a plan for its management. Assessing the disclosure involves assessing the risk the conflict of interest poses to the public authority, and the community interest more generally. This is achieved by assessing the:

- ▶ nature of the public officer's duties
- ▶ nature of the public officer's personal interest
- ▶ potential consequences if the public officer were to favour their interest or influence a process or outcome
- ▶ potential for the public officer to be perceived as biased if he or she were to take part in any activity where the conflict might have impact

Preparing a plan to manage a conflict involves separating the public officer's personal interest from their duties and responsibilities as much as possible. If separating the personal interest from a public officer's duties is impractical, then the risks to which the conflict gives rise need to be managed. But ideally all management strategies need to eliminate the conflict between the personal interest and public duty. This may involve:

- ▶ **registering** the interest so that others are aware that a matter involves a public officer's personal interests (only in less serious circumstances where risk is low)
- ▶ **recruiting** an independent party to oversee all or part of the matter involving the conflict of interest
- ▶ **restricting** a public officer's involvement in the matter
- ▶ **removing** the public officer entirely from the matter
- ▶ the public officer **relinquishing** the personal interest that gave rise to the conflict, or modifying its potential influence over a matter
- ▶ the public officer **resigning** from their public position (in the most serious circumstances)

Management of conflicts of interest also involves ongoing monitoring, because circumstances might change. The following questions should be posed:

- ▶ have the public officer's personal interests changed?
- ▶ have the public officer's duties and responsibilities changed?
- ▶ is the management strategy still relevant?
- ▶ are there issues with the strategy's implementation that require amendment?
- ▶ is the strategy effective – does it allow the relevant process, program or activity to be seen as fair, impartial and not compromised by personal interests?

Common misconceptions and frequently asked questions

Does having a conflict of interest make someone corrupt?

There is nothing inherently wrong with having a conflict of interest. The risk of corruption, misconduct and maladministration arises when public officers fail to identify, disclose and manage conflicts of interest. Conflicts of interest that are concealed or not appropriately managed are a corruption threat.

Making the assumption your conflict of interest is known by others

Assuming everyone knows about your conflict of interest is no excuse for failing to disclose and manage the conflict. Assumptions like this often lead to poorly managed conflicts of interest.

Is it still a conflict of interest if it provides no benefit to the public officer?

Having a conflict of interest is different to whether or not a benefit has been derived from the conflict. To say that you did not have a conflict of interest because you did not act upon or receive a benefit from the conflict is incorrect. Conflicts of interest exist regardless of what action, or lack of action, is taken.

What if a public officer's personal interests are the same as the community's interests?

Sometimes a public officer's personal interests and the community's interest will appear to be very similar. These situations should be treated with caution because there is a risk that despite similarities, the interests will not be identical.

What if personal interests have been disclosed before a conflict of interest emerged?

Many public officers are required to register their personal interests at the commencement of their employment or appointment. This can occur through a register of interests, or by way of the regulation of secondary employment. Registering personal interests helps to ensure integrity in public administration. However, early disclosures do not absolve a public officer from declaring a conflict as and when it arises.

'Set and forget' management of conflicts of interest

Effective management of a conflict of interest requires continued vigilance because circumstance can change. Public officers must continually review their personal interests against their public duties to identify new conflicts. Those responsible for managing another public officer's conflicts must be equally vigilant to ensure that the management of conflicts is adapted to changing functions and duties.

Small gifts can give rise to a conflict of interest

Risks of conflict can arise when public officers accept gifts, hospitality and other benefits beyond those provided through their employment arrangements. Often the giving of gifts, favours and hospitality are designed to develop relationships of mutual obligation. Even small gifts can have an unconscious effect on a public officer's sense of obligation. Public officers ought to consider why a gift, hospitality or other benefit is being offered and adhere to any relevant gifts and benefits policy.

Can disclosing a conflict of interest be enough?

Occasionally the mere fact of disclosing a conflict of interest is sufficient. But it very much depends upon the nature of the conflict, the risks arising from the conflict and the circumstances. Public officers should always take guidance from their manager about the appropriate course of action.

What happens if you don't agree with the proposed management of a conflict of interest?

There will be occasions where a public officer does not agree with the manner in which their conflict is managed. That ought to be discussed with the person responsible for giving directions about the conflict.

Public sector employees are reminded that the *Code of Ethics for the South Australian Public Sector* provides that:

"Employees will... comply with any lawful and reasonable direction issued by a person with authority to issue such a direction to resolve the conflict or potential conflict, including written direction by a relevant authority pursuant to the Public Sector (Honesty and Accountability) Act 1995"

What if my personal interest is very distant or remote?

It can be difficult to self-assess the remoteness or proximity of a personal interest, and whether it raises a conflict. If the interest is a distant association, a mere acquaintance, an interest of insignificant value, or giving rise to a remote chance for a small benefit, it may be sufficient to manage any potential conflict by disclosing that interest. However, it is recommended public officers err on the side of caution and make the disclosure regardless.

Effective conflict of interest management: Integrity of public administration

Conflicts of interest have the potential to compromise functions, processes and programs administered by public officers throughout public administration.

Some of the common functions at risk of being undermined by undisclosed and unmanaged conflicts of interest include the following:

Procurement

The procurement of goods and services is an activity vulnerable to corrupt behaviour, and often targeted by corrupt actors. Conflict of interest awareness and management is one of the primary ways to protect the integrity of this corruption prone activity.

Public procurement processes must be fair, impartial and free from improper influence. Conflicts of interest, actual and perceived, can erode the community's trust that public funds are expended in the public interest.

Contract management

Once a procurement is finalised and a contract awarded, that contract must be implemented, monitored, the receipt of goods and services confirmed, terms and conditions complied with, and variations authorised.

This ongoing work presents integrity challenges, and there are significant opportunities for assessments and decision-making to be influenced by personal interests.

Disposal of goods and property

Conflicts of interest can disrupt not only the procurement of goods and property by public authorities, but also their disposal. Agencies dispose of many depreciated, under-utilised, and redundant assets, the disposal of which could be directed towards improperly furthering personal interests.

Public officers involved in the disposal process should ensure that any personal interests held by them or by others do not affect the way they undertake those tasks. Agencies should ensure any processes for asset disposal recognise and guard against conflicting interests.

Recruitment

The power to recruit someone to a public position, with the salary and other benefits the position confers, is a duty not to be underestimated.

When recruitments and other appointments are undermined by nepotism, favouritism or cronyism, the public loses confidence in the integrity of those doing the recruiting. The merit and calibre of those appointments, and ultimately the quality of government services can also come under question. The *ICAC Public Integrity Survey 2018* found that perceived nepotism and bias in recruitment is a significant source of aggravation for public officers, and can contribute to poor morale and cultural dysfunction within agencies.²

Recruitments should be carefully managed for both actual and perceived conflicts of interest, and inductions containing instruction on conflicts of interest should be standard practice for all recruitment activity.

Secondary employment

Many public officers engage in secondary employments or are involved in private businesses or commercial activities. The *Code of Ethics for the South Australian Public Sector* requires that public sector employees obtain written permission from their agencies for any outside remunerative activity, and also requires them not to engage in such activities where they conflict, or potentially conflict, with their public sector role.

This is a recognition of the considerable risk of conflicts of interest arising for public officers who engage in secondary employment. All public authorities should monitor and assess their permissions for secondary employment, and remind their employees of their obligations under applicable codes and regulations.

Issuing licenses and qualifications

Public officers who grant licenses and issue qualifications wield significant powers over the prospects of many individuals in the community. The opportunities afforded to individuals who are granted licenses or qualifications must be distributed in a fair and impartial manner.

Public officers who issue (or decline to issue) licenses and qualifications in circumstances where they are conflicted, will likely be seen as advancing personal interests over the public interest.

Regulation, standards, testing and compliance

Regulatory functions involve the application of controls or restrictions on certain activities, as well as the assessment and testing of compliance requirements. Individuals and businesses subject to regulation and testing expect those activities to be undertaken in an unbiased fashion.

² ICAC Public Integrity Survey 2018. See, www.icac.sa.gov.au/publications

When conflicts of interest arise for public officers working in regulatory areas, the community expectation that rules are applied evenly and without favour or discrimination can erode.

It is often the case that regulators will have been recruited from the industries or enterprises they regulate. However, conflicts of interest are likely to emerge in these circumstances, and public authorities should be diligent in mitigating and managing those risks.

Public officers also need to be aware of any friendships or personal associations that may develop with the individuals, businesses or organisations they are tasked to regulate. Grooming and capture of regulatory authorities is a significant corruption risk, and even inadvertently developing familiarities may give rise to a conflict.

Grants, sponsorship and program funding

Both state and local government disburse a wide array of grants and sponsorships for a multitude of programs and initiatives. Examples can include community grants for sporting or cultural activities, regional development or employment initiatives, and government backed financing or loans to emerging businesses.

Funding priorities and selection criteria will be subject to change in government policy or direction. However, the guiding notions of impartiality, merit and transparency should remain firm. Those charged with deciding who receives funding or support are obliged to do so in a way that does not generate perceptions of unfair advantage. Conflicts of interest in grant programs will be more apparent in smaller communities, where public officers' will have close involvement in community interests.

Voting, rezoning, planning and development

Due to the enormous profits on offer, decisions related to land use and rezoning are of great consequence in public administration. Decision-makers in these areas can be subject to intense and sometimes improper lobbying by developers and landholders. Strict controls, protocols and accountability are required to ensure that conflicts of interest do not contaminate public decision making.

Resource and asset management

Much like contract maintenance, the ongoing demands of asset and facilities management can mean that conflicts of interest might arise.

The work demands of facilities maintenance are predominantly reactive in nature, and often utilise low value high volume procurements. These features of facilities maintenance make them prone to conflicts of interest that can be difficult to detect, as well as giving rise conflicts which fail to be recognised. New vendors in facilities management should be carefully considered and vetted, and conflict of interest declarations should be required of public officers creating work orders.

Invoicing, accounts and electronic payments

Accounts management is a high risk function due to the volume and pace of invoice processing, and can easily become a target to those with undisclosed financial interests in companies and businesses. False invoices, split invoices, overbilling, system manipulations, unusual purchasing patterns and new unknown vendors are all red flags for potential corruption by undeclared personal interests. Public officers working in these areas should be alive to conflicts of interest, both their own and those held by other public officers in their agency.

Information collection and management

Public authorities generate, acquire and retain vast quantities of sensitive and valuable information. Government information can be misused to either secure personal financial benefits, or to advance improper ends and agendas.

Many public officers will likely come into contact with information in the course of their duties which touches upon some of their personal interests or those of their associates.

Public authorities need to ensure that conflicts of interest are detected and managed for the proper collection, storage and use of information.

Intellectual property

Intellectual property is a complex area of public administration, with public agencies increasingly developing or acquiring intellectual property ownership over a range of products and programs.

Intellectual property is an intangible asset vulnerable to being improperly used by public officers for outside or post-separation employment, as well as being targeted by external business interests and private individuals to solicit unwarranted access to the intellectual property. Tracking potential conflicts of interest among public officers with high levels of access to intellectual property is an advisable measure to ensure the integrity of this potentially lucrative public asset.

Engagement of consultants and contractors

Consultancy is a recognised high corruption risk activity, especially as public authorities increasingly seek external expertise to advise or administer the services of government.

Consultants and contractors will often have, or cultivate, connections and associations with those working in public administration. They may have work histories in public administration, as well as insider knowledge of public agencies from previous engagements.

Conflicts can easily arise in these circumstances, especially as the blurring of lines between public, private and not for profit sectors continues. Consultants and contractors that are engaged to advise on or deliver government projects need to be made aware of the conflicts of interest obligations and public interest accountabilities that pertain in public administration.

Conclusion

It should be apparent from this brief discussion, just how many activities in public administration can be compromised by the presence of conflicts of interest.

The appropriate identification, disclosure and management of conflicts of interest is a duty incumbent on all public officers and public authorities. This is vital to ensure the public remains confident in the fair and impartial provision of public goods and services, and to ensure that delivery of goods and services is protected from corrupt conduct.

Those who work in public administration should take note of the contents of this report, and review their conflict of interest policies, procedures, controls and instructional materials.

Most importantly, public authorities should regularly instruct their staff on their conflict of interest obligations. Conflicts of interest are a recurring incident of the work of all public officers; likewise the obligations should be regularly restated.

For more information on how to identify, disclose and manage conflicts of interest public officers are encouraged to complete the *ICAC Conflicts of Interest Course 2021* — www.icac.sa.gov.au/education

Appendix: Various conflict of interest obligations of public officers

The following details the specific conflict of interest obligations of some public officers. It is not an exhaustive summary of the conflict of interest obligations placed upon all public officers in South Australia.

Public officers must ensure they understand the specific conflict of interest obligations that apply to their role.

Ministers

Section three of the *South Australian Ministerial Code of Conduct* outlines the conflict of interest obligations on government Ministers. Ministers are obliged to 'avoid situations in which their private interests conflict, have the potential to conflict or appear to conflict with their public duty'.³ They are required to advise the Premier in writing as soon as possible after becoming aware of any conflict of interest, and that advice should contain sufficient detail about the conflict to enable the Premier to consider and determine the most appropriate course of action to be taken in the circumstances. The Code also refers to a Cabinet Register for the declaration of private interests, and states it is the responsibility of Ministers to bring to the attention of Cabinet any conflicts of interest they have, even if arising from interests already recorded on the Cabinet Register.

Members of Parliament

The *Statement of Principles for Members of Parliament* adopted by both Houses of the Parliament of South Australia set out several expectations regarding conflicts of interest. These include that Members of Parliament should declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their duties. They should also refrain from accepting gifts or other concessions that create a conflict of interest, and should not knowingly use official information, which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for private benefit. The Statement also refers to the Members' obligation to declare their interests as required by the *Members of Parliament (Register of Interests) Act 1983* and to declare their interests when speaking on a matter in the House or a committee in accordance with the standing orders.⁴

Public sector

The most wide reaching conflict of interest obligations come from the *Code of Ethics for the South Australian Public Sector*, which obliges public sector employees to avoid actual or perceived conflicts of interest, ensure their personal interests do not influence or interfere with the performance of their role, and disclose in writing to their agency head any actual or potential conflicts of interest.

Section 27 of the *Public Sector (Honesty and Accountability Act) Act 1995* imposes a duty on a range of public officers to disclose in writing any personal interests that conflict or may conflict with their duties, and to comply with any written directions to resolve the conflict.

3 South Australia Ministerial Code of Conduct. See, <https://www.dpc.sa.gov.au/responsibilities/cabinet-and-executive-council/resources-and-publications/Ministerial-Code-of-Conduct.pdf>

4 South Australian Parliament Hansard, *Motions: Statement of Principles for Members of Parliament*, The Hon. J.R. Rau, House of Assembly, 23/02/2016.

Public health

Public officers employed in the public health system have obligations under section 92 of the *Health Care Act 2008* to report a conflict, or possible conflict, between their private interests and employment duties. The conflict must be reported as soon as practicable after becoming aware of the conflict, and the public officer must not act further in the relevant matter unless authorised by the appropriate authority.

Police

Police officers have obligations under regulation 8 of the *Police Complaints and Discipline Regulations 2017*, requiring them to not knowingly place themselves in positions that create or are likely to create conflicts of interest. They must also report any such conflicts (or the likelihood of conflict) to a senior officer.

Local government

The *Local Government Act 1999* imposes substantial conflict of interest obligations on elected members of councils, while local government employees are obliged to comply with conflict of interest obligations under that Act. Reform of the *Local Government Act 1999*, including its conflict of interest provisions, is currently being considered by the Parliament.⁵

Public corporations

Directors, senior executives, and employees of public corporations all have conflict of interest obligations under the *Public Corporations Act 1993* (sections 19, 36B, 38A).

Public education

Members of the governing councils of public schools and preschools have obligations to disclose any direct or indirect pecuniary interest they may have in a contract being considered by the council. They must not take part in discussions, and must absent themselves from the meeting room, and abstain from voting in respect of any contract where they have such a conflict. Failure in this duty may result in a \$20,000 fine.

5 *Statutes Amendment (Local Government Review) Bill 2020*.



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