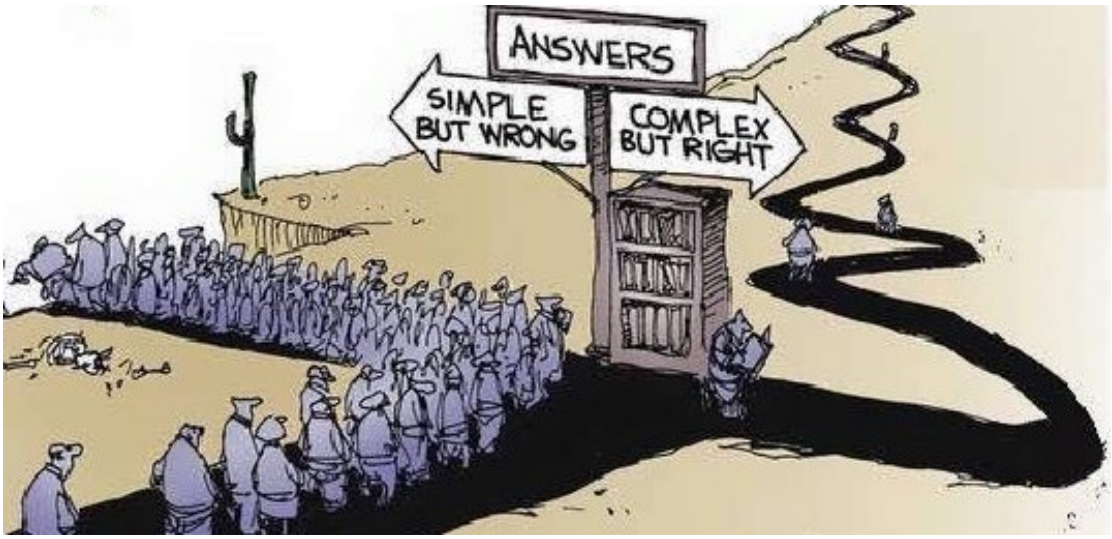
FORGET AGILE, SMART, INCLUSIVE

WHY NOT HAVE A CRACK AT BEING:

DEMOCRATIC, OPEN & ACCOUNTABLE?



SUBMISSION TO THE REVIEW OF THE
LOCAL GOVERNMENT ACT
BY
LARRY GRAHAM
13 Mar 19

EXECUTIVE SUMMARY

This review of the Local Government Act presents a once in a generation opportunity to modernise the State's last remaining colonial processes and the Minister and the Government should be congratulated for taking on such a major challenge.

Sadly, the responses to date have not risen to meet that challenge and few of the significantly underwhelming submissions promote any real change, with the majority pushing their hobbyhorse issues while overlooking the great opportunity this review presents.

Simultaneously being the reviewer, regulator, prosecutor and advisor, hopelessly compromises the Department. And that is in a sector dominated by an incestuous club consisting of the Department of Local Government, WA Local Government Association (WALGA) and the Local Government Professionals (WA).

Successive Royal Commissions and inquiries have demonstrated this behaviour always fails, so we know that having regulators review their own performances and laws is akin to asking the tobacco or asbestos industries to self regulate.

The review team known as the Reference Group is chaired by the Member for Balcatta and has twelve other members. This group excludes any elected officials and members of the public, while the club holds an astonishing nine of the positions on it.

Clearly this is a review process that has been hijacked by the club reviewing itself and this should not happen in such an important process; this must change.

The recommendations in my submission fall into four major interrelated components, Democracy, Boundaries, Planning and Power. Unless all of these components are competently addressed, the local government system will remain its moribund self, only ever capable of producing more of the same. In this submission I make substantial recommendations to:

- Improve accountability, reporting and enforcement.
- Legislatively divide the Department into independent regulatory and administrative bodies. Or alternatively, to create an independent ombudsman for local government.
- Make the WA Electoral Commission responsible for setting boundaries and conducting all local Government elections.
- Change the voting system to compulsory, optional preferential postal voting.
- Base boundaries on a community of interest.
- Introduce legal and binding obligations on elected office holders.
- Correct the power imbalance between elected and non-elected office holders.
- Remove the WA Local Government Association's (WALGA) legislated monopoly.
- Prevent the introduction of Beneficial Enterprises.
- Require live time reporting of donations and gifts.

A significantly smaller, modern law creating powers, defining roles and functions, with timely and enforceable reporting can do this while also requiring increasing levels of democracy, accountability and transparency.

Such a law would enable quicker and more competent responses to changes in processes, procedures and technology through regulatory changes that will be overseen by the Parliamentary Delegated Legislation processes.

Given some goodwill and with a minimum of political risk, there is a real opportunity to design a system of local government for the ages and that is so because the political landscape could not be better if positive change is to be implemented.

The government has a huge majority; the minister in charge is experienced in both levels of government, the public is seeking change, there are few arguing for the status quo and the government has the wherewithal to fund significant change. In politics it does not get much better than that.

Larry Graham

OVERVIEW

To paraphrase that great political philosopher, Sir Humphrey Appleby, it is always best to dispense with the detail in the name of a report; that is what has happened thus far in this review.

There have been excellent councils run by some very bad people and there have been some very bad councils run by excellent people and there have been all stops in between those two extremes. Whilst personalities can be important, it is only the inbuilt checks and balances of the systems in which those people operate that maximises the public benefit and best protects the public interest.

The absence of those checks and balances is the reason why local government falls a long way short of the corporate world and every other level of government in this regard and the proposals coming forward in this review head in the entirely the wrong direction.

Too often Local Government is romanticised and attributed with whimsical values that bear little relevance to its true role and function. The reality is that local government is a level of government, albeit different to the other two levels, and because party and political disciplines are not normal features of it, the overriding political processes are largely, but not exclusively, personality based.

In addition to that deficiency, local government lacks nearly all of the formal accountability measures, checks, balances and standards that apply in the other levels of government and the documents supporting this review recommend little that will substantially change that.

The first general matter that needs to be cleared up is the claim that local governments are autonomous bodies with unfettered authority to make decisions on behalf of their communities. If that were the case the correct place for legislators to have made that clear is in the Content and Intent clause at the commencement of the Act, but they did not; S1.3 says:

"This Act provides for a system of local government by –
(a) providing for the constitution of elected local governments in the State; and
(b) describing the functions of local governments; and
(c) providing for the conduct of elections and other polls; and
(d) providing a framework for the administration and financial management of local government and for the scrutiny of their affairs."

The Act could have made provision for a system of autonomous local governments; but it did not.

The Act could have made the alleged autonomy clear in any part of that clause, but it did not.

What the Act did do was create a system as required by the constitution and established powers enabling the State to scrutinise the affairs of its subsidiary level of government.

When we get to how local government should perform its executive functions S3.18 tells us that:

> *(1) A local government is to administer its local laws and may do all other things that are necessary or convenient to be done for, or in connection with, performing its functions under this Act.*
>
> *(2) In performing its executive functions, a local government may provide services and facilities.*
>
> *(3) A local government is to satisfy itself that services and facilities that it provides –*
>
> *(a) integrate and coordinate, so far as practicable, with any provided by the Commonwealth, the State or any public body; and*
>
> *(b) do not duplicate, to an extent that the local government considers inappropriate, services or facilities provided by the Commonwealth, the State or any public body or person whether public or private; and*
>
> *(c) are managed efficiently and effectively.*

On the face of it when combined with the sections creating local government as a body corporate and bestowing the legal capacity of a natural person that section does seem to allow some limited autonomy for local governments. However that "autonomy" is balanced by other sections of the Act containing qualifications, instructions, processes and binding directions to the extent that neither the word autonomous, nor the concept appear in the Act.

Then there is the inconvenient matter of Minister Omedei's second reading speech that makes it clear that local governments are not, as is often claimed, fully autonomous bodies. Minister Omedei spoke of devolving some powers to local government and he said:

> *"Local governments will also have increased functional autonomy."*

Note that wording is not complete autonomy, but *"increased functional autonomy";* Omedei went on to say:

> *"However, this will be balanced with strict accountability requirements - a key reform. The actions of local governments will be reported in annual reports and there will be sanctions where standards of practice are not maintained."*

No-one reading that could arrive at the conclusions that have been drawn and no one could determine from the second reading speech and the subsequent debate, that the Act itself created an independent republic of administration because it did not. But it has happened by stealth.

The only logical conclusion is that Local Government is a subsidiary level of government to the State and the responsible Minister has considerable powers to act, direct, access information and intervene, and local government has no ability to separate itself from the State; this is made clear in S52 of the Constitution of WA that says:

> *"52. Elected local governing bodies*

(1)The Legislature shall maintain a system of local governing bodies elected and constituted in such a manner as the Legislature may from time to time provide.
(2)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 is respect of which the body is constituted."

Few constitutional provisions are clearer than; the "*Legislature SHALL maintain"* and *"...each elected local governing body SHALL have such powers as the Legislature may provide...."*. Those provisions make it clear that local government is not, and (Constitutional change aside) can never be, independent of State Government. It is also worthy of note that in two referenda the people of Australia have rejected local government moving to the Federal sphere.

However despite the constitutional provisions, the contrary and incorrect view that Local Government is an independent and largely unfettered level of government permeates this legislative review. Whilst that may please WALGA and local government aficionados, it taints and seriously damages any chance for the positive changes that could be delivered through this review process.

It is my recommendation that the new Act make it clear whether or not local government is to be an autonomous level of government; my preference is that it not be. However if that does not carry the day and the decision is made to create the autonomous beast there needs to be a completely different public debate taking place because I am not sure that is what the public either wants or expects.

Autonomous local government also brings into question the removal or devolution of powers that are currently held by various authorities such as; ministerial appeals, SAT, the Planning Commission and the respective planning panels. I am not sure that the public of WA wants this autonomous beast, nor am I convinced that it is the correct direction, however many of the submissions, discussion papers and direction statements are based on such a principle having application.

That this is where this process has led us is the inevitable outcome of vested interests being given either control or significant influence over making the rules to apply to them. Such interests will always put themselves first and that is what has occurred here; and that outcome is as predictable in government as it has proven in politics, sport, finance, law or any other human endeavour.

Those with interests should always be consulted and allowed active input, but they should never be put in the position of controlling or heavily influencing outcomes and this process places them front and centre, whilst at the same time minimising public interest and input. I read, examined and analysed the submissions from WALGA and the Professional Officers' and I assessed their recommendations under six categories:

1 Those that remove or reduce democracy
2 Those that remove or reduce oversight
3 Those that make matters more convenient for administrators
4 Those that expand the administrator's role
5 Amalgamation avoidance that is not covered by point 1

6 None of the above

What I call the vested interest factor is a combination of points 1 through to 4 and the following table shows that for WALGA, 81% of their recommended actions either benefit administrators, disadvantage the public interest or both.

WALGA

1	03	8%
2	24	65%
3	02	5%
4	01	3%
5	01	3%
6	06	16%
TOTAL	37	100%

In the same way, the following table for the professionals shows their vested interest factor is 68% of their recommended actions that either benefit administrators, disadvantage the public interest or both.

Local Government Professionals (WA)

1	09	18%
2	17	34%
3	04	08%
4	04	08%
5	01	02%
6	15	30%
TOTAL	50	100%

I concede that this is a subjective process, but it is better than no analysis at all. What it does highlight is the deeply concerning direction these submissions would take local government in, if they were ever implemented.

It is a basic process failure that both these powerful groups sit on the reference group where all they recommend goes back to them for further consideration – no member of the public, nor any elected official, gets the same two bites.

The same can be said about the use of limited option questions in the survey processes of this review; they are based on that old and tired premise that if you can get enough people to commit to being wrong, you will end up looking as if you are right.

Many of the existing processes of local government have boards, panels, advisory and review bodies that include Departmental representatives, representatives of the various local government staff/executive organisations and WALGA; but it is the exception if these bodies have any members of the public on them.

The other substantial flaw in all the discussion on these matters is that local government has few, if any, of the checks, balances or oversights that operate at the other two levels of democratic government in this nation.

And it is worth reiterating that we live in a democracy NOT a bureaucracy.

That successive Ministers and Departments find dealing with the minutia of local government tiresome and difficult does not remove their constitutional responsibility to do so.

Local government has little or no party politics, no formal oppositions, low levels of serious media scrutiny, no legitimate representative elections, little or no accountability or redress for matters public, severely limited planning responsibilities and it is excluded as a third party from development and planning processes.

In my original submission I pointed out that this review, as important and valuable as it could be, is flawed because it is based on the club reviewing the club. That is indisputable and having government departments examine their own role and function is akin to asking the tobacco or asbestos industries to self regulate.

Departments cannot support or advocate options that are contrary to government policy, i.e. amalgamations, and are consequentially put in the position of having to make political decisions. Inevitably, this results in crucial issues not being meaningfully addressed and those decisions to not address them can never be tested by the public.

That process conflicts with the findings of the Royal Commission into the Commercial Activities of Government. Putting the politics of the time to one side, that Royal Commission was a most comprehensive assessment of our system of Government and it outlined two significant principles that underpin our entire system, they were:

"It is for the people of the State to determine by whom they are represented and governed."

And

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

The Royal Commissioners said of the first principle that:

"This principle carries with it certain consequences. The first institution of representative government, the Parliament, must be constituted in a way which fairly represents the interests and aspirations of the community itself. The electoral processes must be fair. Public participation in, and support for, candidates, parties and programmes is to be encouraged. However, electoral laws should aim to prevent sectional interests from purchasing political favour, and to prevent those seeking election from attracting support by improper means."

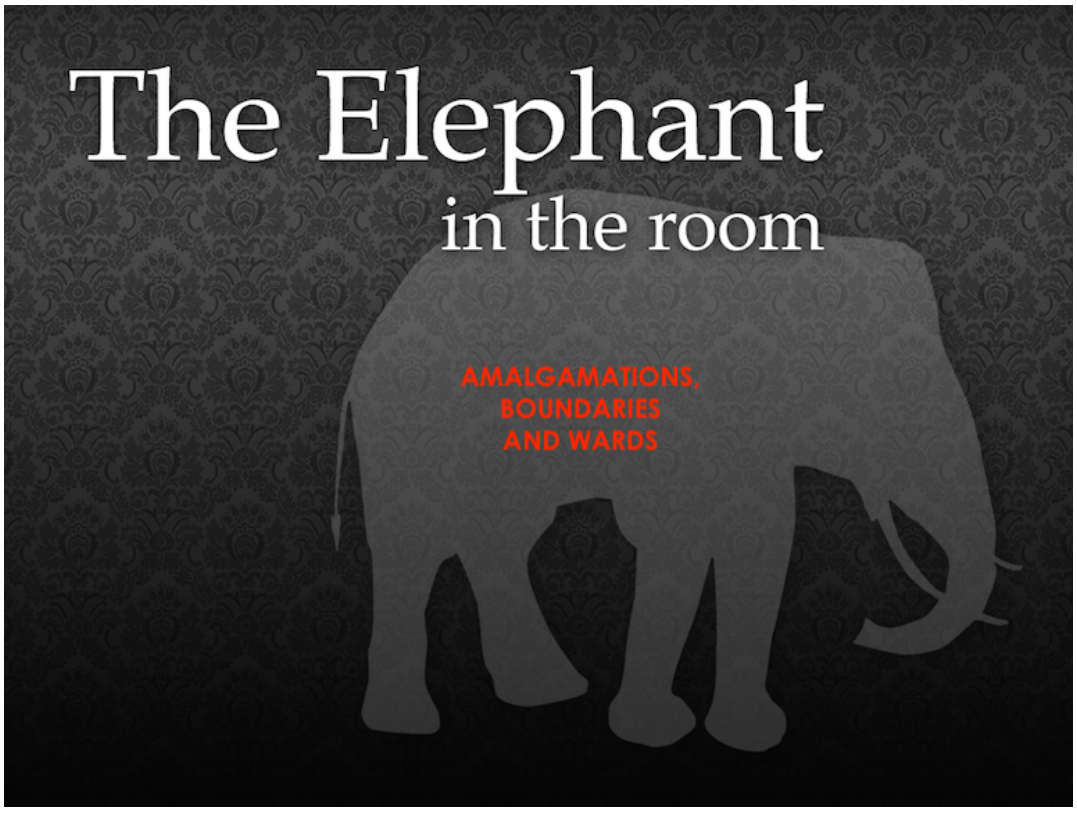
I may return to that later in the section that relates to electoral matters however regarding the second principle, the Royal Commissioners said:

"This principle in turn carries its consequences. It provides the "architectural principle" of our institutions and a measure of judgment of their practices and procedures. It informs the standards of conduct to be expected of our public officials. And because it represents an ideal which fallible people will not, and perhaps cannot, fully meet, it justifies the imposition of safeguards against the misuse and abuse of official power and position."

It is not possible to match those principles and statements with the recommendations flowing out of this review process and that is because all the key accountability and transparency elements the Commissioners spoke of are either missing or ineffective at local government level.

Clearly departmental expertise and corporate knowledge are vital to a review of such a critical piece of legislation as this; and it is necessary that bureaucratic knowledge be injected into the review, but that is a completely different thing to the Department operating the review.

It is a clear conflict of interest for a body to hold all the roles of administrator, regulator and reviewer. Short of an independent commission with extensive powers, the next best option for these types of comprehensive legislative reviews is Parliamentary Committees.



As pointed out earlier the WA Inc. Royal Commissioners laid down a principle that should be the setting and backdrop for this section of this paper:

"It is for the people of the State to determine by whom they are represented and governed."

In local government, the people are prevented from making that determination by a combination of a dysfunctional electoral system, property based voting rights, existing boundaries and the system of wards; all of which are indefensible and demand change, but change is not what is being proposed.

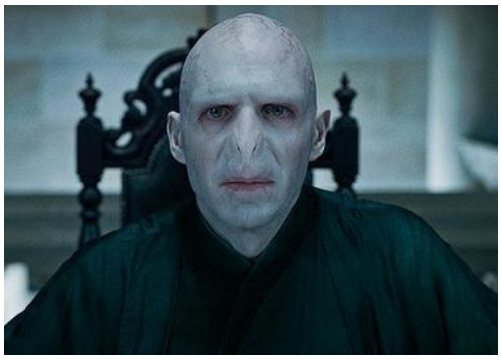
Some electoral law provisions have been partially addressed but the supreme dysfunction caused by the ward system and the existing boundaries have been excluded from these deliberations. This is a curious position to adopt, because the existing local government boundaries are as indefensible as they are expensive, dysfunctional, and unrepresentative.

There is little support for the present system and only public cowardice is preventing genuine reform. And reform is badly needed because the political black holes of low turnouts at elections, illogical boundaries, property voting and corrupt ward systems suck any democratic legitimacy from local government.

Generally speaking most of the "reforms" proposed thus far in this review, paper over the primary problem of the structural defectiveness of local government. Nowhere is this brought into focus better than in the current discussion paper on Administrative Efficiencies that says:

"...the local government sector has long advocated for amendments which provide a tailored approach to local government governance to allow for the differences in capacity that are found across the State."

The resolution of differences in capacity can quite simply be addressed by amalgamations and boundary changes, but extraordinarily, they are the only measures that cannot be spoken of in this review.



Let us imagine that local government did not exist and consider the response to someone presenting the current boundaries as the permanent basis for a new level of government to be created in the State.

The person making the presentation would, quite properly, be laughed out of the room for making such an illogical and inane proposal and that is how this review process should respond to those advocating the status quo.

Defenders of Local Government empire building and those with direct interests have successfully convinced elected decision makers that changing boundaries will bring down political damnation upon anyone supporting change.

The public majority, however, has never supported that proposition and there is no evidence that introducing democracy and sensible boundaries would have any electoral implications other than creating a minor media frenzy.

Research into the attempts of the Barnett Government to change boundaries provided hard evidence of this. Analysis of elector's attitudes in response to the series of referenda that councils held on the subject shows that nowhere did a majority of electors oppose amalgamations.

I repeat nowhere; that is correct, nowhere did a majority of electors oppose forced amalgamations.

People could be forgiven for not knowing that because the subsequent local government sector propaganda campaign claimed the opposite; and they claimed it widely, loudly and without any factual basis and the media gobbled it up as genuine news and current affairs.

Whilst I accept that happens with issues from time to time, it should never replace serious assessment by those with the power to make change, but that has been the effect of that very clever media manipulation by local government.

I accept that the current government gave an election undertaking that there would be no forced amalgamations however I do point out that what I propose does not require forced amalgamations. I do recommend change by providing the means for it to happen in an orderly and competent manner.

The reasons for the current boundaries are many and varied; but what is clear to most is that modern technology has changed the world. But it has not changed local government, and while ratepayers provide free iPads/tablets, phones and travel allowances, local government seems blissfully unaware that since Roads Boards were established in the early 1900's:

- We now have vehicles which, with no difficulty, can travel distances unimaginable when the boundaries were first introduced; and
- modern communications and computer/tablet/phone technology means that a head office can be remote from the administration; and
- that regardless of the location of either, the same modern communications can allow councillors and constituents to freely exchange views and information; and
- modern teleconferencing facilities allow regular "face to face" meetings and deliberations without the need and cost of travel; and
- electronic administrative measures and processes mean that anything can be made available over the internet – for example the financial/planning divisions of remote shires can easily be located in the city or suburbs; and
- modern technology means that for little, if any expense, councils can stream their meetings to their constituents; and
- a reduction in costs in smaller councils would be matched by increases in services and efficiency; and

- antiquated and Dickensian administrative processes and procedures can be modernised and allow ratepayers' funds to be used in a significantly more inclusive and competent ways; and
- modern communications allows for real time budgeting and reporting to constituents; and
- modern communities are fundamentally different to those when the current boundaries were implemented; and
- councillors are now paid; and
- local government CEO's are now very well renumerated; and
- other than for recreation, nobody travels to meetings by horse.

The major drivers of the inaction and arguments opposing changing borders are cowardice, inherent conservatism, vested interest and a reluctance to fully embrace democracy and the benefits of modern technology.

It used to be that governments at State and Federal level set the boundaries for seats in their Parliaments; this quite naturally led to gerrymandering and unfair electoral practices culminating in both these levels of government establishing independent electoral commissions.

One achievable and highly appropriate modern solution to the amalgamation/boundary political impasse in this state would be to negate, or at the very least minimise, the effect of vested interests and petty politics by removing MP's, Ministers, Governments, Councils and departmental bureaucrats from the boundary setting procedures.

No-one would suggest that we return to the bad old days of those in State and Federal governments setting boundaries; so why do we have to continue to accept that change at the local level needs approval of local governments?

If local government was drowning in democracy and had widespread public support, maybe someone could make a case for this; but that is not happening, as the discussion paper on elections makes crystal clear:

"Historically, voter turnout in local government elections in Western Australia is poor compared to other jurisdictions. In most local government elections fewer than one-third of eligible electors cast a vote. In the 2017 ordinary elections, approximately 34.2% of eligible electors cast a vote.

Participation rates have been relatively unchanged since the introduction of postal voting in the late 1990s. Prior to the availability of postal voting in most local government elections, participation rates averaged just 15%."

Between 15% and 34% of the population voting is hardly a clear demonstration that this is the level of government closest to the people and in any rational decision making process, this is where the discussion on amalgamations would end.

But it does not; begging the question of what other matter would be considered too hard to handle when 65.8% of the population does not care enough to vote in it?

But the political danger myth is perpetuated and the matter is not on the table as it should be and without this sort of modernisation the rest of the discussed changes are largely impractical and will do little to improve local government.

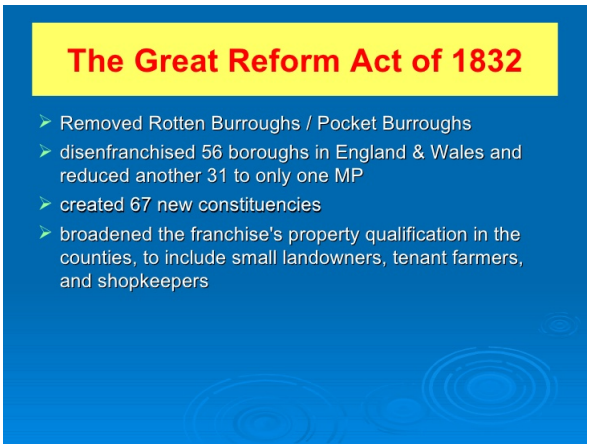
Parliaments gave the independent electoral authorities in higher jurisdictions the power to make regular boundary changes after hearing from interested parties; they are almost always non controversial and are implemented administratively in accordance with the electoral laws.

If serious decision makers were able to see beyond the arguments of self-interest, they would be aware that legislatively enabling the WAEC to regularly review boundaries reflecting a community of interest, population, industry, rural, suburban, city, town etc. could address this problem.

It is not my preferred option, however, an alternative to the WAEC could be the re-establishment of a dedicated local government Boundaries Commission to be the sole arbiter in setting boundaries. This will only work if the enabling legislation required boundaries to be set on the parameters similar to those I have outlined, but such a change seems to me to be re-inventing the wheel. The current Act changed the old boundaries commission into the Local Government Advisory Board but largely left the processes and rules intact and therein lays the inherent problem of incremental conservative change.

A systemic change to the WAEC can, and should, involve public input; would break the current political impasse and would have the added advantages of being easily defendable and in the public interest.

This simple and inexpensive change would remove from State Government the need to confront angry and self-interested demonstrators angrily expressing the voice of the minority. Such a change would drag the local government system kicking and screaming into the 19th century – hopefully we can then work on bringing it up to modern standards at a later date.



Once the debate moves on from these antiquated provisions regarding boundaries and size and moves towards community of interest and democratic representation it should also drag us towards other significant changes.

These discussions should be public and open and revolve around economies of scale and efficiencies; creating the most effective bodies to best represent communities of interest, payment/non payment for councillors and the possibilities that may be presented by having less councils with full time and paid elected representatives.

These can be emotive issues and there are strong arguments on both sides and while I have no firm view on many of them, a review of this type is precisely where things like that should be discussed and decided on. Sadly that is not occurring and I attribute this to either the flaws in the process, or the minimalist approach being adopted because the significance of a review of the Act has not yet fully sunk in.

REGULATORY COSINESS

WALGA legitimately acts in the interests of local government and it has repeatedly made it clear that it is prepared to pursue independence for local government by any means except democracy, openness and responsibility. Since it inception it has pursued initiatives that reduce the public input into local government.

However it is important to note that WALGA exists to promote the interests of local government, it does not exist to protect the public interest. It is self-evident a great chasm exists between those two interests and WALGA is on the wrong side of it.

Formed under the Gallop Government with the intention of providing one source of advice to the Government on matters relating to local government, WALGA arose out of an amalgamation of all the previous local government organisations.

Why its monopolistic position is legislatively entrenched is a mystery and I strongly recommend that Division 5 of the current Act be deleted and the legislated monopoly be removed. WALGA would then have the opportunity to operate as either a private company, an incorporated association or any of the many other lawful vehicles open to it.

When discussing WALGA it is important to keep focussed on the fact that it is not a local government, nor is it a body that represents the public interest; its defines itself as:

"The WA Local Government Association is the voice of Local Government in Western Australia. As the peak industry body WALGA advocates on behalf of the 139 WA Local Governments and negotiates service agreements for the sector"

WALGA has a vision to:

...be powerful and influential in representing, supporting and leading Local Government."

And it says that:

"The WA Local Government Association (WALGA) lobbies and negotiates on behalf of 139 WA Local Governments. As the peak lobbying and advocacy organisation, we have a strong influence on how policy decision are made that affect the sector"

It is important to reiterate that WALGA is not a local government, it has no regulatory powers and has no authority over Councils; but since its inception it has promoted itself into the mainstream of decision making in a way that no other lobby group in WA has been able to.

The blurring of the roles of the Department and WALGA is not only bad practice; it is dangerous, muddies the regulatory and governance waters, reduces accountability and makes public accountability and transparency more difficult to monitor and oversee.

It is not unusual for local governments to give WALGA policy and advice the same status as that provided by the department. This happens to the extent that many councillors are completely unaware that WALGA and the Department are different entities.

While both now offer similar services and advice, one body is an association and the other is the regulator and that clear distinction between those two entirely different roles needs be highlighted. Very good cases in point are the websites of the two bodies; first, the Departmental Compliance and Governance page:

"The Local Government (WA) division of the Department of Local Government, Sport and Cultural Industries supports the Western Australian local government sector in the provision of good governance and compliance by monitoring, promoting and enforcing compliance with legislation.
It supports local governments by administering and reviewing the Local Government Act 1995, developing related policy, processing statutory approvals and supporting the Local Government Advisory Board and the WA Local Government Grants Commission."

Secondly, the WALGA equivalent:

"WALGA Member's Governance Advice

Member Local Governments, Elected Members and Officers, have access to the WALGA Governance Advisory Service providing guidance on matters relating to the Local Government Act and Regulations, other legislation impacting the operations of Local Government and governance best practice. For further information, email the WALGA Governance Team"

The clear impression given by that comparison is that the Department "*supports the Western Australian local government sector"* when that clearly is not the role of a regulator. Their job is to regulate and the spate of recent Royal Commissions have all highlighted what happens when regulators and those they are supposed to be regulating get too cosy with each other.

And this relationship is way too cosy; another great example of the misunderstanding of the respective roles is the Departmental website description of the role of the Minister for Local Government.

"The Minister for Local Government is responsible for overseeing the system of local government in WA. The Minister acts as a champion for the local government sector and supports and monitors the system of local government with the assistance of Local Government (WA). The Minister is not directly involved in the day to day operations of individual councils."
(Emphasis added)

Those descriptions aptly describe how the parties see the relationship, but it is not how it is meant to be; Ministers are high ranking and democratically elected representatives

with Parliamentary responsibility for administering departments. Because they are answerable to Parliament for all actions taken by their departments, Ministers should have working relationships within and across all their areas of portfolio responsibility.

But Ministers have no responsibility, implied or otherwise, for the actions of an association operating within their spheres of ministerial responsibility and Ministers are certainly not *"champions"* of those they regulate and administer. Ministers do however have a primary role as the protectors of the public interest, meaning that if they are *"champions"* of anything it is that and that alone.

In the same way as amalgamations and voting do, this issue arises all through this submission and that is because the relationships between the regulator, the Minister and the local government bodies taint the process.

Nothing demonstrates that tainted relationship more than the Agreement to Guide State – Local Government relations that was signed on 2 Aug 17. The signatories to it were:

Mark McGowan – Premier
David Templeman – Minister
Lynne Craigie – President WA Local Government Association
Jonathan Throssell – President Local Government Professionals Association (WA)

This agreement creates a partnership between local and state government, treating both as though they are equal partners and completely overlooking the inconvenient fact that they are not.

As mentioned elsewhere in this submission, the constitution makes it clear that local government is a subordinate level of government and it is overseen, regulated and authorised by the state level.

These are not equals and promoting local government to that standing is dangerous; the agreement is mainly general statements however it does establish a formal Partnership Group to *"discuss matters of importance to both sectors"* and says the groups will address:

- *"Strategic issues relating to the relationship between State and Local Government;*
- *Strategic policy and program matters where State and Local Government are key stakeholders;*
- *and Policy formation of a State or community interest to Local Government or where Local Government will be impacted."*

This extraordinary agreement then goes on to entrench the subordinate level of government in the decision making process of its regulator by requiring:

"The State Government should consult with Local Government when developing, amending or reviewing State legislation and regulations, policies or programs that will significantly impact Local Government operations or resources."

But it does not even end there, after setting timelines for that consultation to take place the agreement then cements these two organisations in place

"When consulting at a State level, WALGA and LG Professionals should be the first point of contact. These two peak bodies are able, through formal and informal policy development processes, to develop representative responses and submissions on behalf of their respective memberships."

Then after having locked the wider community out of these processes this extraordinary agreement then ends with this almost unbelievable statement.

"Both spheres of government commit to working together to improve decision making processes that deliver greater transparency and community accountability: recognising and respecting that each sphere of government and the community are a partner in this process."

Nobody in any community had any input into being made a partner in this process.

When we go on to more closely examine the formal relationship between the regulating department, WALGA and the professional officer's association (Local Government Professionals WA); we discover this organisation also does not exist for any public interest purposes; its strategic plan says it exists:

"To enable our members to realise their local government career and leadership aspirations and to ensure that their voice is critical in shaping the future of the association and our sector."

That effectively means that the organisation is a highbrow union or professional association and there is nothing wrong with that, but those admirable purposes may not be in the public interest; however we do get a far greater insight in the Association's vision statement:

"We are the leading association for all professionals and emerging leaders in local government.

- *We are a strong, independent and influential association;*
- *We focus on real career benefits;*
- *We always put our members' needs first.*
- *We consider all local government officers to be professionals, and we help our members contribute to their communities by supporting their personal and professional development."*

And there we have it; this organisation that is sitting alongside WALGA (And we should always remember that WALGA exists to service local government and not the public interest) influencing the major decisions on the future of local government has a vision that "*We always put our members' needs first."* And this Association has only three goals:

- *"Significantly enhance the membership value of our Association;*
- *Be recognised as a highly valued and respected organisation;*

- *Build a financially strong and well-resourced organisation."*

These visions and goals are all about the professionals and not the public, who do not get a mention in any of them. Why that is so becomes a tad clearer when we examine a public statement of that body, which I remind you exists to benefit its members and not the public. Advertising a Webinar held on 21 Feb 19, that association says:

"Local Governments are constantly under attack from business, media and the community at large. There is always a segment of the community that feels there were not listened to. No matter how much consultation there is the - the local government never consulted enough. And with social media – starting a battle is all too easy. In addition to being irritating, infuriating and expensive to address. They can also impact negatively on the credibility and standing of everyone involved. Strategies to mitigate conflict are therefore essential."

That rather paranoid and passive aggressive assessment of public input, which I concede can be difficult at times, is a fascinating insight into the organisation. And what it overlooks is that public input and criticism are fundamental to scrutiny of governments in a democracy and this organisation has already drawn the battle lines and vilified that input as being *"under attack".*

That may well be (I don't think it is, but it may be) an acceptable position for a professional officers' association to hold, however, it is not an attitude that should be accepted from a body involved with a review of legislation of this type.

It genuinely sets my alarm bells ringing that representatives of an organisation expressing such dated and undemocratic principles are in the room advising on legislative changes while the public are excluded.

But the more you look, the more interesting it gets; this association has a nine person board with two honorary board members, they are:

- *Director General, Department of Local Government Sport and Cultural Industries.*
- *Chief Executive Officer, WA Local Government Association.*

I am not suggesting there is anything improper in those people holding those positions being on the board of this organisation; what I am suggesting is that it is unwise and demonstrates the incestuous relationships within the local government club.

The high level cross pollination reinforces that view, as does the knowledge that the association is by constitutional right, an associate member of WALGA, part of its dispute procedures and the President of this association sits as an ex-officio member of the WALGA State Council.

That incestuous relationship extends even further because the Department that is the regulator of this industry and reviewer of the current law is also a Principal Partner of this association. And it does not end there, on 21 Feb 19 WALGA announced that *"A senior executive from the Department of Local Government, Sport and Cultural*

Industries has been appointed as the new CEO of the WA Local Government Association."

The incestuous relationship between the regulator and the regulated is now fully consummated.

The recent spate of Royal Commissions and inquiries have all highlighted the failures of regulators who got too close to those they are supposed to be regulating so we know where all this will end; the only possible outcome is failure and neglect by the regulator.

In the recent report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Commissioner Kenneth Hayne addresses the role of regulators, where he said:

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

And

"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."

I will return to the rule of law later, but the point of the Hayne C's comments is to reinforce that, for it to have any meaningful purpose, the law must be both applied and enforced.

My concerns about the cosiness of this relationship are heightened when one considers the composition of the internal reference group that is tasked with reviewing all that comes before them.

This influential group is chaired by first term MLA David Michael, the Member for Balcatta and includes representatives of:

- WACOSS
- WA Electoral Commission
- Chamber of Commerce and Industry
- Regional Chamber of Commerce and Industry
- Multicultural Advisory Group
- Association of Mining and Exploration Companies
- Minister's Office
- WA Rangers' Association
- Australian Services Union WA
- The Department
- Local Government Professionals WA with four representatives
- WALGA with four representatives

Holding a total of nine out of thirteen positions on this body means that the club has the overwhelming majority of the say; and if that is not bad enough, I note that there are no elected representatives on this panel as there are no members of the public.

There is no doubt that the nexus between the professional association, WALGA and the Department must be addressed and their dominating role in this review should be ended.

Thus far in this review, the thrust of the changes proposed do not reflect any understanding of the principles outlined by either of these Royal Commissions. The effects of the changes proposed are to reduce public input, make administrator's jobs easier and to reduce healthy democratic input into what is a largely moribund level of government.

Turning now to the specific discussion papers that have been issued, it is not my intention to go through each one chapter and verse but simply to provide an opinion on the substance of each one.

ADMINISTRATIVE EFFICIENCIES

Consistency is often mentioned in the discussion papers and it is often used as a substitute for central control – the discussion paper says many submissions were received *"concerning the inconsistency of local laws from one local government district to another"*. Well, so what? If the electors in each jurisdiction want different laws why should they not be able to do that?

No one makes WA adopt Victorian laws simply because they are different; nor does the Federal Government adopt Indonesian Laws for the same reason. Each jurisdiction makes its own decisions based on its own interests and at a local level if different towns/suburbs/jurisdiction cannot react differently what is the point of having different governments in each place?

I return to the amalgamation concept that, if introduced properly, would create jurisdictions based on having a community of interest. Such a change would allow different communities with similar interests to govern their communities in those common interests; this of course means different outcomes in different communities and that is how it should be.

The idea of consistency probably stems from the Parliamentary delegated legislation processes that are also in need of reform with the overriding emphasis no longer being on exceeding legislated power, but on consistency and conformity with central laws. S3.7 of the Act says:

"A local law made under this Act is inoperative to the extent that it is inconsistent with this Act or any other written law."

Removal or amendment of that section would allow a local council to have the power to exceed state legislation in a local law; I strongly recommend that occur. The current system where the central government uses its power to impose laws, not as minimum standards, but as laws that cannot be differed from is a rather dated, centralist concept.

What if a council wanted to ban feral animals within their jurisdiction? What business is that of the state government? Once the power to do so exists, then surely it is up to the electors of the jurisdiction to decide – if they want the ban also, why should it not be allowed to happen? I note here that this is simply an example; the principle applies to any matter. I suspect the desire for uniformity is driven more by, either developers with multi jurisdictional interests, and/or bureaucratic imperatives rather than any real desire for beneficial outcomes in communities

The requirement for an obligatory review of local laws should be removed in its entirety. Why review every eight years? Why not every year, or every five years or just pick any number you want? There is no such requirement at any other level of government and one would never be adopted.

A more rational approach would be to require each local law to have a specific review date; then reviews will be included in a routine and scheduled local legislative review program.

The discussion in this paper over the Local Government Grants Commission and the Advisory Board again highlights the conflicted role of WALGA. While it is not uncommon to have industry representation on industry groups and councils; having such a body (and its fellow travellers) holding the majority of positions on decision making boards that allocate funds and scrutinise boundaries, wards and councillor numbers is obviously inappropriate.

The other glaring oversight in these two bodies is that there is no-one representing the public interest; once again it is the club reviewing the club and on this occasion distributing public funds to the club but doing it from behind closed doors and to the exclusion of the public.

The various suggestions in this discussion paper also highlight the WALGA influence on this process, for example:

- The discussion over the quality and content of proposals submitted to these boards are a red herring. Boards of all kinds regularly receive submissions and proposals of varying standards and it is the job of the board and their administration to follow through on each one to the best of their ability. That this can be cumbersome and time consuming is irrelevant, it is what boards do.

- The submissions regarding raising the number of electors required to change boundaries etc. is another nefarious attempt to make any form of change to representation, boundaries or amalgamations more difficult. The discussion paper says *"...which may lead to a proposal being submitted that is not a true representation of the community's view."*

  You must be joking; in a sector where almost no-one votes and almost no-one gets involved, it is only here that we get concerned about a *"...true representation of the community's view"?* And it is not even in making a decision; it is about bringing forward a proposal. This submission should be ignored.

- The parts of this paper dealing with Information being provided to the Minister are areas where the sector is again seeking to remove levels of oversight; these recommendations made should be rejected. What is completely missing from those recommendations are what, if any, accountability processes would replace the current oversight provisions.

The policy position paper makes some directional announcements that are also questionable:

- Special Majority – it is already decided that this will be removed from the Act and I have no great problem with that, despite its removal being another change, which lowers the accountability standard of local government.

  Constitutional majorities in votes are required and managed at a parliamentary level at some inconvenience to governments and one wonders why it is only local government that cannot deal with differing majority votes for different purposes.

- Designated Senior Employees is a provision that has long grated on the professional officers of local government. The reason is that it restricts their ability to run their empires without interference from their council. The policy position paper put forward that: *"The separation of powers and clear delineation of roles is fundamental to local government and removing potential sources of confusion is strongly supported."* There is no separation of powers, and I refer you to my earlier submission where this matter was dealt with in detail. I understand the need to remove elected representatives from interfering in the daily operations of a local government and it was through the 1995 amendments that Parliament sought to overcome this particular problem and they were successful.

  However professional officers have extended that ambit to exclude councils from any legitimate form of oversight and that clearly is not in the best interests of local government. These provisions do not allow a councillor or council to interfere in the daily operations of a local government. At best they impose minor accountability measures on a CEO to report and explain any proposed changes to senior management before they occur; they also remove from the CEO the unfettered power to hire and fire senior people in the organisation.

  These are commendable and very necessary oversight powers that should be retained.

  There is a conflict between S2.7 (1)(b) of the Act that makes councils responsible for the functions of the local government and removing this provision; meaning that if it is removed there will also be a necessary consequential amendment required to S2.7.

COMPLIANCE

There are a range of discussion papers, recommendations etc. that I intend to address under this heading, these relate to CEO matters, Integrated Planning Processes, Financial Management and Standards.

However before I do that there are some general matters that need addressing. These matters all stem from a widespread view in local government that, unless there is a specified penalty in a law or regulation, there is no requirement to comply with it, nor are there any consequences. That view directly contradicts the Rule of Law, which is a critical principle and base requirement of any functioning democracy.

RULE OF LAW

Having its western origins a little over 800 years ago in the Magna Carta, the Rule of Law is not evident in how the processes related to local government in Western Australia are being administered, interpreted and applied.

The Rule of Law is a complex field of law that is beyond my qualifications and the remit of this paper, however the definition appearing on the webpage of the Federal Attorney General's Department serves the purposes of this submission:

"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."

It is apparent that many in local government do not understand this principle and that is understandable because it is also obvious that elements within the departmental regulator do not fully comprehend the importance of this principle either. Just how far removed from the Rule of Law local government has become is demonstrated in a recent court case (SHIRE OF TOODYAY -v- MERRICK [2016] WASC 29 (8 February 2016)) where the magistrate said:

"47 The Shire also points out that the LGA does not expressly provide what the consequences are for a failure to comply with the procedures set out in pt 8 div 4."

For the purposes of this submission the particular matter before the court is irrelevant, what is important is the expressed opinion that, as there are no specified consequences for failing to comply with targeted legislative provisions, those provisions can be ignored.

Anecdotally, departmental officers/WALGA trainers and councillors are often heard to say that, of the huge amount of provisions in the current act, there are only x clauses with penalties. Implicit in that view is, unless there is a penalty, the clause is optional and if that attitude is to prevail, this review is doomed to failure.

The Rule of Law is important and the understanding and attitude of both the regulator and local government to this important principle will determine the type of legislation necessary.

The current doorstopper law is symptomatic of what happens when legislators conclude that the only way laws can work is with detailed and prescriptive legislation. These are dated and heavy-handed ways of attempting to micro manage through legislation. It is an approach that presumes the legislators know best and that they have the knowledge and experience to envisage every possible circumstance and can determine the optimum solutions for all participants, which of course they cannot.

It is not how modern legislation should be working; modern laws should establish definitions, powers, penalties and principles with the detail being left to regulators. This allows for far quicker corrective responses when matters that have not been confronted before arise within the legislated powers. A relatively quick change to the regulations allows matters to be put back on track; whist still maintaining the involvement of Parliament and the legislators through the delegated legislation processes.

Again I return to the theme that the checks and balances of every other level of government being absent from local government. The dilemma for Ministers and Departments is that they seek outcomes in terms of participation, efficiency and responsibility that are nigh on impossible to achieve legislatively and rather than deal with the politically sensitive root causes they try to draft laws that patch over these issues and unfortunately that is where this review takes us again.

The current system establishes processes that lead to "curtain" councils – they have all the window dressing and appearance of complying. When examined closely, what are supposed to be sophisticated compliance and accountability processes are little more than box ticking exercises with councillors being blissfully unaware of their obligations to oversight CEOs and administrations.

FIDUCIARY DUTY and LIABILITY

Many of the formal submissions labour the point that many councillors do not understand their role, have little idea of the law and regulations and when speaking to elected representatives, probably the most common thing heard is that they (councillors) are there to carry out the wishes of their community.

All good stirring stuff that is, but the absence of any meaningful democratic processes and with the public's desire to stay as far away from local government as possible; how can the elected ones ever know what their community wants?

How do the well meaning and mostly good people who are councillors, ever learn to govern responsibly?

The body responsible for training them has been successful in getting mandatory training introduced; for the reasons I expressed in my initial papers, that change will provide a ready revenue stream to the training organisations that proposed it, but it will not address the fundamental problem of the absence of democratic checks and balances.

A far more useful place to start this discussion would have been to compare the roles and responsibilities of a company director with those of a councillor. And I say this

because financial decisions may well be greater in local government than in many businesses, and the effect on the public is certainly greater. Sadly the accountability is the reverse of that as formal responsibility and accountability are significantly superior in the latter field than the former; a quick comparison is illuminating.

The ASIC website lists the significant responsibilities of a director of a company, they say:

"There are numerous and important legal responsibilities imposed on directors under the Corporations Act 2001 and other laws, including the general law.
Of these duties, some of the most significant are:

- *to act in good faith in the best interests of the company and for a proper purpose*
- *to exercise care and diligence*
- *to avoid conflicts between the interests of the company and your personal interests*
- *to prevent the company trading while insolvent (i.e. while it is unable to pay its debts as and when they fall due)*
- *if the company is being wound up, to:*
  - *report to the liquidator on the affairs of the company*
  - *help the liquidator (e.g. by giving the liquidator the company books and records that you may have in your possession).*

The current Local Government Act S2.7 removes any such personal liability from individual councillors and shifts it to the Council, it says that Council:

"(a) governs the local government's affairs; and
(b) is responsible for the performance of the local government's functions."

I do understand what the law change in 1995 was seeking to achieve, but in doing what it did, it also removed any formal obligation from individual councillors and shifted all responsibility onto the collective council. When we look at the legislated role (S2.10) for councillors we can see what I consider to be a major legislative error.

"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."

It is clear in corporate law that the responsibilities of the company and the directors are delineated and distinct, but in this state, other than in the Local Government (Rules of Conduct) Regulations 2007, there is no such clear distinction made. But even that weak regulatory prescription is described as a general principle that is further

downgraded as being for *"guidance of council members but it is not a rule of conduct that the principles be observed."*

The Local Government Act is silent on the responsibilities of councillors, and that is not how it should be; I strongly recommend this change and 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. 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, WALGA 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.

Every day of the week, right around the world, members of parliaments and congresses do it and one can only wonder why it is that local government representatives should be open to punishment for publicly questioning official decisions. But they are; and heavy-handed office holders and some CEO'S use this antiquated provision to intimidate individual councillors. It is my view that this provision should be removed from the statutes, regulations and codes.

Another major question relates to the whether or not individual councillors have any sort of fiduciary relationship with their constituents. This is another complex area of law in which I am not qualified. However, for the purposes of this process it is sufficient to say that such relationships and duties arise when a person undertakes to act in the interests of others and not in their own interests; when that situation arises, some consequential obligations are incurred.

This is the position councillors find themselves in and it is an area that this review should examine in detail because even if such a direct relationship does not exist currently, I argue, not only that it should, but furthermore, individual councillor responsibilities and obligations should be codified and included in the new act.

All of which neatly brings us on to the matter of:

STANDARDS

Nowhere is the influence of the club reviewing the club more obvious than in this area.

For a member of the public dealing with the complexities of the current system is mission impossible; it requires them to know which of the multitude of organisations can deal with their complaint. And that list of bodies to which one can take a complaint includes the local authority itself, the CCC, the Department, Standards Panel, the Ombudsman, Public Service Commission, Police, Auditor General and, of course, the Minister and the Governor.

A complainant is required to know which law, regulation or policy their complaint breaches and they must know this before they can determine whether their complaint is major, minor, misconduct or corruption. They have to do that within a restrictive timeframe and they must also have a detailed knowledge of the system of government in order to have even a rough idea of which body should deal with their concerns.

It is hard to see how a complaint process could ever be made more complex or less user friendly; it is as if the system is designed to deter public complaints.

Although councils sometimes do have complaints processes and complaints officers, there are no requirements for complaints processes to be dealt with in any professional

or orderly manner. There is no compulsion to deal with complaints and I personally made one single complaint that resulted in two mutually exclusive outcomes.

The solutions proposed for this are the retention of the Standards Panel with some modifications, a mandatory code of conduct for council members and a shortening of the time in which complaints can be made.

There is no sound argument that can be made against mandatory provisions in a code of conduct across the sector and I don't seek to make one. However it is what is in that code of conduct and how it is enforced that are the key issues that are not being addressed in this process, and they should be.

Returning to Hayne C again and I do this because he is the most current and topical advocate of changes in governance; while he was dealing with the banking industry, his points on enforcement and the law have much wider application. Regarding codes of conduct he said:

"I consider it important that some provisions of industry codes be picked up and applied as law, so that breaches of those provisions will constitute a breach of the law."

I agree with Hayne C that this is important, however the papers in this process make it clear that the code will be developed with *"input from the local government sector and the Public Sector Commission"* and again I draw attention to the exclusion of public input in processes that will directly affect the public. I get more concerned when I read the feel-good nonsense that this code is going to be based on:

"Part 1 – Principles - The overarching principles that require council members to serve the best interests of the people in the community and work together as a council."

For comparison, the Code of Conduct of the Legislative Assembly of the Parliament of Western Australia says:

"The purpose of the Code of Conduct is to assist members of the Legislative Assembly in the discharge of their obligations to the Legislative Assembly, their constituents and the public at large."

Those two conflicting code principles reinforce just how far local government is removed from being a functional democratic system.

The code of the Legislative Assembly does not require working together; it does however acknowledge the different responsibilities that an MP has and requires them to discharge their obligations accordingly.

Because healthy functioning democracies are about how differences are handled, that is a grown up way of doing things and the principle of a council being required to work together is symptomatic of all that is wrong with local government and it needs to change.

This is not an argument for division or factionalism, if anything it is recognition of the reality that, as a contest of ideas, democracy can be fractious; however what does need

to be reinforced in a code of conduct is that councillors should be free to object and argue their case.

The Standards Panel's current punitive powers are to require a person against whom a complaint has been sustained to a mixture of publicly apologising, being publicly censured or undertaking training. It is proposed to extend these with powers to mediate between the parties or order reimbursement of the panel's costs in the event of an adverse finding.

The change to order reimbursement of costs in the event of an adverse finding is a positive step forward in making elected officials and administrators accountable for their behaviour.

One minor modification that is necessary is to prevent any such ordered payment coming from the public funds of a council. Consider the irony of a ratepayer taking an action against an office holder only to find that the punishment resulting from an adverse finding is that the ratepayer's money be used to pay the imposed penalty.

What I am proposing may sound harsh, but when considering this matter I refer you to the parts of my submission that relate to the difference between corporate and councillor standards, roles and responsibilities.

Many of the infractions dealt with by the Standards Panel are minor in nature and some are miniscule; it is hoped that this new imposition will be used judiciously as, with the above caveat, it could well become counterproductive if it became a standard penalty.

Unless it is covered somewhere else that I have not seen, there is no provision for dealing with recidivist offenders and I suspect this is more an oversight. I am aware of the changes that allow the Minister to dismiss individual councillors and if it does not already, that power should be extended to include similar Ministerial powers based on the recommendations of this panel, if it is retained.

The standards panel is also another club gathering comprising three members, there is one from the department; one experienced council representative and someone with relevant legal knowledge, which is fine as far as it goes. But it is the appointment process that is defined in Clause 4 of Schedule 5.1 of the current Act that grants power for nominations for the council representatives exclusively to WALGA.

This power should be removed and replaced with one that allows the Minister to consider experienced Councillors or members of the public who nominate themselves. Members of the panel should be required to confirm their independence and be free from loyalties to external bodies and there is no substantive reason why the Association that is the peak industry body advocating on behalf of local government should be able to run a closed shop on these positions.

Examining the decisions of the Standards Panel is an interesting exercise because it appears that the bulk of the complaints are made from within local governments with public complaints being the minority. I do not claim this is an exhaustive exercise because it is not, however, in recent weeks I have examined a large number of the decisions and that is the view that leaps out of them.

It is possible that an analytical academic examination could show a different outcome, but for these purposes it is interesting that public complaints seem to be the minority; and that not only speaks volumes about the public view of this system, it also indicates that the complaints system has become weaponised.

Another unaddressed weakness in the Standard Panel processes is that it has no investigative powers; to some extent that weakness is diminished by its power to hear evidence. However, if the body is to be retained, it is hard to see how creating a discretionary power to investigate matters could do anything other than enhance the powers of the panel.

A major error in the proposals is the six-month timeframe within which a complaint must be made; albeit I accept, it is proposed that the panel may extend that statutory time if it feels it is in the public interest.

The earlier option in the first round discussion paper was to restrict this period to three months and after this time complaints are deemed expired, effectively giving a free pass to administrations that cover up indiscretions for three months. Time limits appear in a variety of jurisdictions and the only purpose they serve is to restrict complainants' right to complain.

For example, the constraint on the Ombudsman is two years; after that they cannot initiate a complaint, why? If an adverse event takes place 729 days ago it can be dealt with, but 730 days and investigation is prohibited.

It is my very strong view that there is no need for any such provision in the Act, nor is there a need for any regulatory time limit or restriction; all that may be required is a stipulation that the only time constraint on the complaint processes of local government is the statute of limitations.

One further matter of extreme concern to me is the WALGA recommendations that the Act should be amended 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.*
- *Provide for a complainant, who receives a Local Government discretion to refuse to deal with that complainant, to refer the Local Government's decision for third party review.*
- *Enable Local Government discretion to declare a member of the public a vexatious or frivolous complainant for reasons, including:*
    - *Abuse of process;*
    - *Harassing or intimidating an individual or an employee of Local Government in relation to the complaint;*
    - *Unreasonably interfering with the operations of the Local Government in relation to complaint. (sic)"*

Wow!

What an extraordinary recommendation to come forward in a democracy.

In essence this recommendation means that a person holding public office that a constituent wishes to complain about; someone who delays, frustrates and obfuscates for long enough will then be legislatively empowered declare the constituent trying to work through all that, vexatious.

What possible public benefit is there in that?

As someone who chairs a Progress Association that routinely questions the processes, policies and procedures of our local authority and this unfortunately annoys office holders who take great umbrage at being publicly questioned.

If this terrible recommendation were to be adopted, those people being questioned would have the legal and unchallengeable power to declare our office holders vexatious and legitimately refuse to respond to our questions.

Any citizen who complies with the laws, rules and regulations has the right to question those in public office and there are many existing rules, standards, policies and procedures that allow presiding officers and administrators to deal with vexatious behavior.

There is little evidence that any substantial change is necessary and that some find it uncomfortable is no reason to change the law, nor is it a reason to further tip the power imbalance more heavily towards executive staff at the expense of the public.

In isolation this recommendation is bad enough, however alarm bells should be ringing loudly when it is placed alongside a recommendation from Civic Legal that claims the "*CEO's corruption notification role erodes trust."* This submission explains this critical matter thus:

"One area that should therefore be seriously considered for reform in this context would be with respect to section 28 of the Corruption Crime and Misconduct Act 2003 ("the CCM Act").

Section 28 requires the "principal officer of a notifying authority" to notify the Corruption and Crime Commission of any matter which that person "suspects on reasonable grounds concerns or may concern serious misconduct"."

Again, I am alarmed at how those associated with Local Government seem to consider that accountability laws and anti corruption measures should not apply to them for some special reasons. This submission continues with:

"The intention of parliament is commendable in seeking to remove corruption through placing obligations on key persons in organisations like local governments. However, the CEO's obligation to report corruption in this manner is a corrosive element in the climate of trust and confidence that should reside in the relationship between a CEO and his or her council.

Section 28 turns the CEO into a state government agent under a duty to police serious misconduct amongst the very councillors who employ him or her. On the other hand, the CEO is also under a duty to be a loyal and trusted employee of the council, guiding it, advising it and executing its decisions."

Fancy arguing that because there is a relationship between an executive and a governing body, the most senior executive member should not have a responsibility to report suspected corruption.

The truth is that the CCC provisions are no different for a CEO in local government than they are for any other public service CEO, but this submission then goes on to suggest:

"The interaction of these two roles places the CEO in a conflict between two duties. Perhaps the obligation under the CCM Act should reside in some other person within the administration. At least in this way, the policing function under section 28 is removed to a person who does not have the most direct relationship with the council."

If adopted, this recommendation would allow the most senior administrator in a local government to turn a blind eye to corrupt behaviour but place a subordinate in that unenviable position.

It is amazing that anyone would advocate that reporting suspected corruption to the relevant official corruption body should be downgraded and have a lower priority than inconveniencing a highly paid executive.

And if you are not already outraged at these proposals consider that there was an important and comprehensive report from the State's top corruption body, the CCC report of 2 May 17; that was rejected by WALGA on 3 May 17, the very next day!

Clearly corruption is not a top shelf item in local government and this review process should not countenance either of these terrible suggestions.

They should be soundly rejected; however if they do make their way further through this process, the Minister and the Parliament should immediately reject them.

BENEFICIAL ENTERPRISES

There is no doubt who is pushing this change, it is a change that seeks to solve difficult political problems by creating entities outside the public processes of local government, the discussion paper says:

"The local government sector through the Western Australian Local Government Association (WALGA) has long advocated to be able to establish corporate entities that are independent of the local government and which operate under normal company law."

Which begs the question of while local government is constitutionally answerable to the WA legislature and if these entities are created to be independent of local government and subject to Federal corporate law, how can they meet the constitutional

requirements applicable to local governments?

The supporting argument for these processes goes that forming Council Controlled Organisations (CCO) in WA is in some way analogous to the New Zealand Model.

This is convenient, but there are some important differences between our two countries, with NZ being more similar to the UK model than ours. e.g. Australia is a Federation of States – NZ is not, Australia and the States have written constitutions – NZ does not and because there are no States in NZ, local government plays a completely different role to that in WA.

There is genuine issue with the model proposed by local government in that it takes the control of public funds away from elected representatives and transfers that power to people with no public authority or mandate.

It is bad enough that the current system places that self-interested body WALGA as the key player in the purchasing, procurement and provision of services worth millions of dollars each year.

There is little public information on the processes, prices and procedures WALGA utilizes and the organisation does not publicly release its annual report. In effect millions of ratepayers' dollars are spent annually and by whom it is spent, where, where it is spent, on what it is spent and how much WALGA makes out of the processes is concealed from the public.

It is interesting to note that the WA Auditor General examined Local Government Procurement in October last year and found:

"All 8 local governments we reviewed had shortcomings in their procurement practices, most related to weak procurement controls, processes and documentation for tendering, purchase orders and approvals, and reviewing invoices and payment. However, we did not identify any evidence of misconduct.

Local governments varied in how well they complied with legislation and their own procurement policies. While local government's policies broadly met regulatory requirements, they need to do more to monitor procurement controls and the effectiveness of processes. We saw no notable difference in the effectiveness of controls between the regional and metropolitan, and the small and large local governments we examined.

Having policies and controls that are appropriate, and monitoring their effectiveness is essential if local governments, and the ratepayers that they serve, are to have confidence in local government procurement activities. Procurement practices that focus solely on minimum compliance with legislation are unlikely to provide local governments with the oversight and control they need to address risks and ensure value for money in their procurement.

The issues identified in this audit are relatively simple to fix. By addressing them, governance of this important local government function can be strengthened."

The Auditor General is recommending strengthening governance in this area of local government's operations and went on to recommend:

"All LGs, including those not sampled in this audit, should review their policies, processes and controls against the focus areas of our audit in Appendix 1"

Six months on from that major accountability report, it would be interesting to find out just how many councils have taken the action recommended by the Auditor General.

But, given the Auditor General's advice and recommendations to strengthen governance it would be absurd to change the law to enable a dramatic weakening of it; however that is what the suggested beneficial enterprise process does.

We know local government officialdom struggles with the concepts of public interest and democracy, but we live in a democracy and not in a bureaucracy and sometimes that means that people in positions of power are required to do things that they find uncomfortable. When other people's money is being used, our system should not establish contrived organisations to bypass strong accountability measures.

It is proposed that those in charge of these public funds be bound and regulated by corporate law, however the "shareholders" in these ventures are the ratepayers of the districts involved and as the only required reporting will be through the production of an annual report and a non-enforceable statement of intent, ratepayers will never be directly informed of what is happening to their money.

Those advocating for these bodies are not proposing any provisions requiring full and continuous disclosure. The Australian Stock Exchange (ASX) Rule 3.1 makes the enforceable imposition that:

"*Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.*"

Although I cannot see any good reason why these enterprises should ever proceed, if others determine it is to be so, then obligatory reporting provisions similar to those of the ASX should be inserted into the new act.

It is important to note here that while annual reports serve many useful purposes, as a local government accountability measure, they should be classified as an abject failure. They should be retained but in the 21st century, there is no reason why local government finances, accounts and performances cannot be reported in live time.

CCO's and beneficial enterprises are completely at odds with the findings and recommendations of the 1992 WA Royal Commission into Commercial Activities of Government, who, when addressing government's role in commerce said:

"3.13.2 The vital issue is not the activities in which government engages, but the conditions under which it engages in them. The public is entitled to insist that government be conducted openly and that it be, and be seen to be, accountable for its actions. Nowhere is the need for this more apparent than when it undertakes initiatives which put public funds and resources at risk."

I defy anyone reading the proposals for the introduction of Beneficial Enterprises/CCO's to reconcile them with that telling statement and I submit that on this ground alone these proposals should be soundly rejected.

The documents say that there were many submissions expressing concern over privatisation; to which I say, so what? Such concerns are easily expressed and should always be considered, however in this instance the views expressed are dated and unfounded socialist claptrap and while it is good grist for the media mill, it is very poor government to succumb to such nonsense.

But put that to one side for a moment, and just imagine if those concerns over privatisations were valid and we set out to reverse all those that have occurred over the years.

It would again be illegal to own gold, the private power network in the Pilbara would have to close; Governments would once again own and operate all the communications systems, the housing, the press, banks, cordial factories, food supplies, hotels and airlines to name but a few. Silly is it not?

Privatisation has a role to play in modern societies and I suggest that it presents a far better option for local government than do CCOs and probably the best example is rubbish collection. Once the sole purview of local government; in most cases rubbish collection has now shifted from a local responsibility to a regional one that is almost totally privatised.

This issue again highlights the structural unsoundness of local government because without regional councils, the rubbish collections system would collapse. Should that happen, no thinking person would suggest rubbish collection should revert to individual local government's employees to the exclusion of private contractors.

The discussion papers talk about accountability measures that can be introduced to deal with beneficial enterprises; however nothing proposed deals with the fundamental issue of removing public funds from a public body and transferring their direct control to non elected people with no public mandate, limited accountability and no financial reporting requirements.

By the way, any ministerial oversight can only ever be a box ticking exercise; it is simply not possible for a Minister to make any value judgment on proposals of this type. Which takes me back to the WA Royal Commissioners who examined precisely this problem and they said:

"The vital issue is not the activities in which government engages, but the conditions under which it engages in them."

If the conditions under which these proposals are to take place cannot be publicly outlined, discussed and deliberated on before the change is made, the change should not be made. The same is true for any "in principle" agreement to take the matter forward; the threshold issues are:

- What, how and why public money should be passed to a non public enterprise, and

- how this process will be publicly monitored, and
- who will be held accountable for it all, and
- how they will be held accountable.

Unless all those matters are known beforehand, the process should be jettisoned because, without such prior knowledge, the system will almost certainly fail.

As a footnote to this section, when talking about local government and its financial abilities, the anecdotal evidence of the Rothwell's collapse, the global financial crisis and a number of other financial crises is that the biggest losers from all of those corporate/banking collapses were churches and local governments.

I think that clearly highlights the risks of increasing local governments' ability to avoid scrutiny and democratic controls. Parliament decided that local governments should not have an unfettered right to invest and imposed S6.14 to control local governments investment decisions:

"Money held in the municipal fund or the trust fund of a local government that is not, for the time being, required by the local government for any other purpose may be invested as trust funds under the Trustees Act 1962 Part III."

Given past experiences and the proposals to further reduce accountability and openness, this very sensible provision should be retained.

COMPLIANCE AND INTEGRATED PLANNING FRAMEWORK

The Integrated Planning Framework, including the strategic planning processes is a valid concept that was born out of an attempt to focus councils on engagement with their community, accountability, competent planning, compliance and improved standards.

Conceptually it is a good process that by and large has not been as successful as it should have been and this may be because many local governments do not fully grasp the concept. Meaning that instead of it being the sophisticated and integrated planning process it was designed to be, it has morphed into a box ticking exercise.

There are many reasons for this and the discussion goes way beyond including it in a paper such as this; but a quick look at the interim report of Commissioner Kenneth

Hayne of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry delivers up a sentiment that prevails in local government in WA. Hayne C said:

"The first round of hearings revealed some common and recurring themes about what importance the entities whose conduct was examined in those hearings give to regulatory compliance. Some have been mentioned already but it is as well to bring them together for the purpose of considering what they show.

The evidence led in the first round of hearings pointed towards:

- *the entities concerned preferring profit to pursuit of any other purpose; and*
- *the entities treating regulatory compliance as a cost of doing business rather as a foundation that informs and underpins how the business must be conducted."* (28 Sep 18 - Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry by Kenneth M Hayne; Commissioner)

The Integrated Planning Framework (IPF) of local government in WA suffers from the same problem as that described in the last paragraph of that quote from the Royal Commissioner. In many places the guidelines, restrictions and obligations incurred under the IPF are considered an obstacle to be overcome rather than an integrated and inclusive process.

The IPF is doubly damned because not only are many councillors contemptuous of the processes; in most places, the public also avoid it like the plague. What happens when minimum standards are set, is that they very quickly become the benchmark and while involving the community is considered a major driver of this process, an achievable standard is considered to be where:

"Community engagement involves at least 500 or 10% of community members, whichever *is fewer, and is conducted by at least 2 documented mechanisms."*

This means that it is officially acceptable that a vital community driven process has done well when 90% of the community ignore it – I refer you back to my comments regarding this claiming to be the level of government closest to the people and I do want to labour this point because the community is less connected to local government than is conceded by this process. A good example is on P7 of the discussion paper on this item that says:

"It is well recognised that local governments have a strong relationship with their constituents and are an effective vehicle for engaging with the community."

This is not correct, the evidence does not support it and basing extremely important processes on this hype is never good policy. Departmental guidelines tell us that:

"The Integrated Planning and Reporting Framework and Guidelines includes a user-friendly "self-assessment good practice checklist" to assist local governments in their continuous improvement."

But despite that, once their strategic plans have been adopted, in many councils they stay on the shelf until the next review is required and they are then dragged off and the

pretence starts over. All the features that are supposed to flow from a competent strategic plan; LTFP, Corporate Business Plan and budgeting etc. are also consigned to the bookshelf by that box ticking mentality.

Overall the IPF is a good thing that has been poorly implemented and it is there the challenge lies; it is my recommendation that the compliance requirements be tightened with increased reporting, formal follow-up and reparative action taken when councils stray back into box ticking mindsets.

I draw decision makers' attention to my other recommendation regarding legislatively splitting the functions of the Department; such a move better facilitates this process, as do obligatory reporting processes.

As a footnote to this section, my random searches of a large number of local governments websites show a remarkable commonality between strategic plans and this leads cynical old me to believe that there is a plethora of consultants out there specialising in this work. While there is little wrong with consultants (I was one) strategic planning done by word processor is dangerous, as is using folks to do detailed local planning when they have little local knowledge.

It is important here to draw attention to and reinforce that Local Government is a regulated level of government. Again I return to the difference between the processes of corporate governance and regulation versus the requirements placed on local government.

For example, ASIC is able to prosecute banks if they breach their obligations to tell ASIC of any unlawful behaviour within 10 days. In local government this reporting process can take over a year and even then it is unlikely that there will ever be any enforcement or corrective action forced on the offending council.

Similar comments can be made about Annual Reporting requirements of local government; I will not spend too much time on it here but these processes, including annual electors meetings, are largely considered to have failed.

That is not a reason to end these processes or to make them harder, it is a reason to make them relevant and valid at the same time as imposing stringent and timely reporting requirements.

The wise comments of Hayne C relating to laws being to be not only observed but also enforced substantially change the game for regulators and cosy relationships with those they regulate should not be tolerated.

Hayne C points out it was not that no-one noticed that operators in that field were breaking the law; it was more that the regulators had to choose between negotiation and litigation and, when they did, they were most likely to opt for the former course of action.

When talking about the rule of law, the point I raised earlier of the implicit view of regulators that, unless there is a penalty, complying with a law or regulation is optional, directly contradicts Hayne C. It is self evident that the rule of law, community

expectations and good governance all dictate that this soft regulatory view should no longer be tolerated.

However, I do concede that, being regulator, prosecutor and advisor the Department is in a hopelessly compromised position; however this is not an unusual problem for governments to confront.

In many other areas the government is both the regulator and participant and in these instances government has developed alternative structures that separate the core advisory, administrative, regulatory and prosecutorial roles and functions of conflicted organisations. Such laws require the different component parts to operate independently of each other.

In essence what I am recommending is that:

- The Department be legislatively split into two independent bodies; one advisory and administrative and the other an independent compliance and regulatory body; or
- the Department remain and an independent authority/Ombudsman be formed to regulate and police local government; including all complaints which are not serious enough for referral to the CCC.

A similar administrative division of the department's different roles currently exists, but it would be significantly enhanced if that divide were legislatively backed. This would mean the regulatory side dealing with timely reporting, strong enforcement and prosecution of breaches, with the administrative side doing training, advising and optimising and prioritising the democratic processes of local government.

However in the event that neither of these options proves acceptable to the government of the day, what cannot be allowed to continue is the blurring of the Departmental and Ministerial roles and functions. Firm and prescriptive legislative action is required to refocus all those roles on the public interest.

The other issue that should be examined here is the WALGA recommendation that:

"Capacity building should remain a responsibility of the Department in ensuring the improvement of the Local Government sector, however in line with recent practice, this would best be facilitated by funding external or third party service providers to deliver targeted activities, thereby eliminating the potential for conflict with their compliance requirements."

Again, this recommendation fundamentally shifts the responsibility for a critical matter away from the local government and onto the State; ironically this means that the strongest advocate for the autonomy of local authorities is conceding that ground. Put that to one side, because surely capacity building is a fundamental responsibility of the organisation the needs its capacity built? Any competent organisation should have the training, professional development and mentoring processes in place to build its own capacity.

The argument posits that smaller councils have the greatest need for this but have the least financial ability to undertake it. I agree with that assessment but how this issue should be addressed is not by shifting responsibility to the State; it is by amalgamation and/or closer cooperation aimed at councils reaching a higher level of administrative and political competency.

VOTING

Many of the matters that arise under this heading have been already been addressed earlier in this and my previous paper; but would someone please explain why we have 226 elected representatives to govern the entire country; 95 to govern this huge state, but to govern WA local governments we have over 1000 elected representatives?

The opening paragraph of the discussion paper on electoral matters says:

"Elections are a fundamental part of local democracy. Local government draws its legitimacy through elections. Elections provide a direct voice for the community and provide the primary means of holding local governments accountable."

Would that were true; but it is not, and thankfully the document goes on later to negate this statement by pointing out:

"Historic voter turnout in local government elections in Western Australia is significantly low with only 34.2% of eligible voters casting a vote in the 2017 ordinary elections. This raises the question as to how reflective local government councils are of the communities they represent."

Because these poor voting levels remove any electoral legitimacy from this level of government, it is imperative that it be corrected and I have no hesitation in strongly endorsing the proposal for compulsory voting in local government elections.

However that is not where reform of this part should end; in my earlier submission I drew attention to the property franchise, which is at odds with any understanding of modern democratic processes. Property rights of this type were abolished at state/colonial level in WA in the 1890's and nationally in 1902 and I again strongly recommend that the same removal occur at the local level.

Then there is the matter of the voting system and without going on at length; the system that delivers the least democratic outcomes is the First Past the Post (FPP) system, which allows people with tiny votes to be elected against the will of the majority.

The simplest explanation of the wrongness of FPP voting is to use ten people standing for election in an area of 100 votes; eight get ten votes, the ninth gets nine and the winner gets 11. That means that 89% of the voting public did not vote for the person who wins the election.

There are flaws in any electoral system, however FPP is the one least likely to produce any meaningful democratic outcome; I do concede that there were problems with voting blocs using the previous exhaustive preferential system to also subvert electors' wishes.

To overcome both those electoral rorts and adopt a system most likely to increase democracy and involve more of the wider public is to have the WA Electoral Commission operate postal voting in elections based on an optional preferential system.

I strongly recommend that course of action.

This obviously means consequential legislative changes to exclude councils from running their own elections, to end the CEO returning officer provisions and to require postal ballots as the norm. The WALGA recommendation that elections be able to be run by other, and possibly private concerns, should also be soundly rejected.

Electronic voting is raised as a possibility in the discussion papers and I urge a conservative approach to adopting these processes. The reason for that is that the current system allows for a secret and untraceable voting paper to be anonymously placed in a ballot box or a postal vote being placed in foil inside an envelope.

In both cases there is no possibility of the vote being linked to an elector; however the same cannot be said for electronic voting. To avoid electronic tampering every vote must be identified and that in turn allows identification of the voter.

Even the possibility of this must not be tolerated, as the secrecy of each vote should be paramount. After all, this is the country that invented the secret ballot system and it would be a shame if we rushed to destroy it.

The other legislative change in this area that I strongly recommend is the removal of the provisions of Schedule 4.2 – Order of retirement from office of councillors. This anachronistic provision is another process that only exists to subvert the will of electors. In my earlier submission I said:

"For whatever reason, past state legislators thought that continuity was important so they required staggered elections; thereby making it impossible to vote a council out of office.

No such provision could, or would, exist in any other level of government.

Can you imagine the response to the unlikely scenario of the newly elected Premier, Mark McGowan being required to have former Liberal/National Ministers in his cabinet for "continuity purposes"?"

The continuity argument is nonsensical and would not be tolerated in any other level of government so I pose this question to the review team:

In a democracy if we cannot vote a body out of office – what is the point of voting?

If the reviewers cannot answer that, the way forward will become clear to them; however if they can answer it, we have a real problem.

As they place administrative restrictions between the elector and the candidate, the proposals for mandatory training and pre-election qualifications should be strongly opposed. I addressed this matter in detail in my earlier submission and the changes recommended make me apprehensive about what is being proposed.

Electors are capable of making up their own minds who to vote for; they do it at both other levels of government and there is no reason why they should be denied that opportunity at this level.

Similar things can be said about discussions to limit electoral spending. What candidates spend and where it comes from causes no problem until it is concealed from the public. In other states developers are excluded from making donations and

this has had an imperceptible impact on voting in local elections and I suggest this is because voters are capable of deciding who they should or should not vote for.

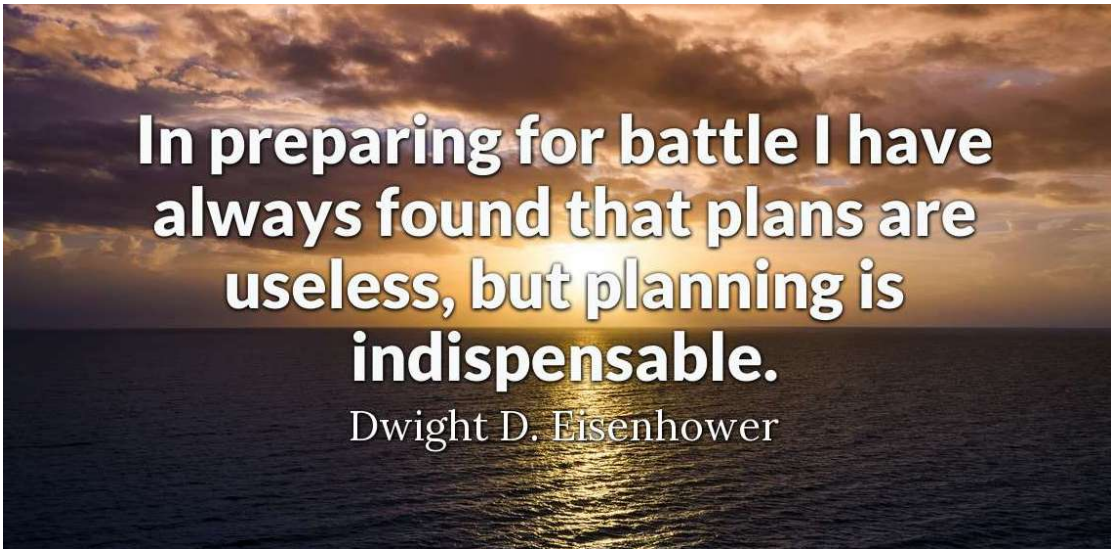
The provisions I would seek to impose are that:

- all donations be declared, and
- donors incur a legally binding and enforceable responsibility to disclose who they donated to, and
- all donations should be made public (with live time reporting), and
- the imposition of heavy penalties for those who breach these requirements.

Two other relatively minor matters should be addressed and they are the removal of wards; which is addressed in my earlier submission and the possibility of legislating for recall provisions.

Recall is a simple process whereby when a certain number of electors sign a petition in prescribed manner, a recall election should be held. I strongly recommend that the new Act end the system of wards, as I recommend legislating for a recall system.

PLANNING



Aside from the Integrated Planning Framework, planning is not a matter that has been addressed in the review thus far; but because planning is integral to local government, it should be.

It is fair to concede that over the years local government has won few friends with its convoluted planning processes. It is interesting to note that the objections are mainly about the time consuming, irrational, expensive and counter intuitive processes, rather than the decisions made.

This is a subject that one could write a book about, however for these purposes it is sufficient to say that it is irrational to ask local government to reorganise, plan, be responsible and accountable to their communities when their planning powers are so

severely restricted. I struggle to see how a local authority can effectively govern a community unless it has control of planning.

With little justification, the drive for central planning almost always comes from central planners/bureaucrats; however there is more justification to the push from developers/businesses who operate across jurisdictions.

Rigid central planning of the type we have often fails the public interest test as it serves the interests of the major groups I referred to earlier and there are two very big questions posed by the current planning processes and they are:

- Why should the views and policies of unelected and distant planners operating in private have more say than properly elected local officials? Note the term "properly elected".

- If a local government based on a community of interest is not allowed to plan and act in the interests of that local community, what is the point of local government?

It is fundamental; surely if the hills want to be clean, green and arty why should they not be able to do that? If the western suburbs want to be different again and be big blocked leafy suburbs, why not? If a country town wants to retain its old worldly atmosphere or does not want rubbish tips all over it, why should it not be able to say no? Why should beachside areas have the same planning systems as isolated desert towns?

All those communities' interests would be better served if their elected representatives were directly and legitimately connected to their community by a fair and responsive electoral system and if they had the normal planning powers returned to them.

I submit that communities should be allowed to chart and be responsible for their own futures, however at very rare times there may be a state interest that conflicts with local planning and the system should deal with that.

But there will always be differences on how planning should work, there will be times when local governments do things that the State does not like; but if the planning is in the best interests of that community, the State should stay out of it unless there is a clear and definable state interest.

In that event, the State should be able to deal with it; the sole proviso for state intervention has to be the presence of a definable state interest. Once that is established, how the differences are managed is the test because the stuff we all agree on is easy and in healthy democracies it is how you manage and handle your differences that is crucial.

We have to accept that there were serious problems with local government and its planning processes, as we have to accept that there are serious problems with the imbalance built into the current planning processes.

The crucial question that this review must address is the one posed earlier that if a local government based on a community of interest is not allowed to plan and act in the interests of that local community, then what is the point of local government?

I don't want to spend any more time on this matter because it is complex requires amendments to other laws and, of itself, it is worthy of detailed examination and public debate. The very least that should be included in the recommendations arising out of this review is extending the third party appeal rights to local authorities.

POWER IMBALANCES

To maximise the chances of local government raising its standards and achieving higher responsibilities and outcomes, the many inbuilt power imbalances of the local government system must be corrected.

These imbalances are entrenched and they exert powerful and debilitating influences over the entire sector; in some cases unless they are redressed they will negate any changes that may emanate from this review process. In fact one imbalance is so out of whack that the validity of this review process is challenged by it.

- WALGA and Professional Officers v Department – this power imbalance is the most critical and difficult one because the two protagonists are more active and aggressive than the department. They have been successful and are so powerful in this sector that they are dangerously counterproductive. This can be fixed, but finding the political courage for the fight is hard, particularly as the two organisations are officially partners. But somehow that courage must be found because the current imbalance borders on corrupt and it is debilitating to the entire local government system.

- Another major and critical imbalance is between State and Local Government; the constitution makes it clear that local government is a creature of the State, the current Act muddies that water and ongoing departmental and ministerial desires to get away from the minutia of local government have led to a breakdown of regulation and oversight. This reaction combines with the power imbalance to encourage legislative micro management.

  But of all these power issues this one is the easiest to remedy. If the state and local government really do want to create an autonomous level of government all they have to do is write that into the new Act. Job done.

  BUT if that is to happen there better be a lot of public discussion about it beforehand, because I am not convinced that the public want it. I may be wrong, but my experience tells me most people want more and not less state intervention in local government.

  However that public desire for intervention and oversight is countermanded by the standard bureaucratic/ministerial response of *"Local governments in Western Australia are autonomous bodies and have the authority to make decisions on behalf of their communities."*

  As I have pointed out earlier, that position is, at best, an expedient one used to avoid responsibility for decisions made by a subordinate level of government.

  The State has the power to act, but chooses not to use it, thereby weakening the authority of both levels of government. Not using a power does not remove it and it is that power imbalance that must be addressed, or at the very least clarified and codified.

  If the decision is to create an autonomous level of government, that means that ministerial appeals, SAT, the Planning Commission and the various planning panels powers have to be removed or devolved – those are major changes that are possible, but they are complicated, and are not raised in any of the papers to date.

- Then there is the CEO issue. As discussed earlier, in democratic systems anything that does not accept the primacy of elected office should never be countenanced.

  The concerted efforts by, and the combined power of, CEO's, their professional association and WALGA have convinced nearly all that there is an indissoluble separation of powers between administration and council.

  I addressed this in detail earlier and also in my original submission; whilst that separate power proposition is pure fiction, I will go as far as to concede that there are different roles for each party but I reject the separation of powers argument.

  The relationship is not one of two equal powers competing; one is there to govern and the other is an employee of that governing body. I further draw the

reviewers' attention to the Regulation 9 of the Local Government (Rules of Conduct) Regulations 2007 that is headed *"Prohibition against involvement in administration".*

It is clear from S(1) that a council can authorise a council member to *"...contribute to the administration of the local government..."* And S(2) of the same regulation excludes anything *"that a council member does as part of the deliberations at a council or committee meeting."*

Clearly the legislators and regulators did not intend the blanket prohibition that is currently being imposed. What the lawmakers sought to prevent was wholesale interference in administration but they still included provisions requiring oversight and controlled interference. However the catch is that, as the officer advising council, the CEO is also the officer who can officially recommend for or against interference in his or her own functions and roles.

Firstly, one wonders how many CEOs would recommend that course of action and secondly I doubt many councillors in this state understand either that they have those powers or that they even exist.

The second tier of this issue is that the Parliament did not grant any reciprocal power for the CEO to involve themselves in the work of council; in this regard their only "power" is in an advisory capacity.

Without revisiting the entire issue, the role of the CEO as the adviser to councils is an extraordinary one and the current Act places an unelected individual in a supremely powerful position.

Other public or private CEO's are required to present options to their governing body and no other bureaucrat in the nation gets to tell their governing body there is only one option – now do it or explain yourself.

Suffice it to say that this chronic power imbalance was not anticipated and the system is so far out of balance that unless it is corrected no other reforms are likely to succeed.

RATES

This is another issue that could well be the subject of an entire review process in its own right and my earlier submission raised the question of the complexity and expense of the current rating processes.

The discussion paper has a small segment entitled "Rating of mining licenses" that says:

"Mining tenements include prospecting and exploration licences and mining leases which are granted under the Mining Act 1978. The mining sector argue that due to the negligible impact of prospecting and exploration licences on local government facilities and the fact that they are a right to explore, not a mining business, they should be exempt from paying local government rates."

I note that the Association of Mining and Exploration Companies sits on the internal group that is an integral part of this review. However, simply because anyone can make that same claim, the mining sector submission should be ignored.

For example, like many people I live in a community where, apart from driving on local roads, I use almost no Shire provided facilities. The ones not used, i.e. rubbish collection, are paid for, as is the emergency services levy; and it is open to those in similar situations to claim exemption from rates on precisely the same basis as the mining industry is doing and our claim has as much validity as does theirs.

The rating exemptions in the current act should all be removed and replaced with a general legislated provision that allows local authorities to rate all property and apply their own exemptions, if they so choose. This move would replace entrenched privilege with an ability for a local authority to elect to not rate those properties that they may decide provide significant benefits to the local community.

For example, what possible justification could there be for normal everyday ratepayers to subsidise the blanket exemption from rates of Australia's largest exporter of grain? This business has revenue in excess of $4 billion, operates a healthy surplus of $128 million, provides rebates of $95 million and produced a net profit after tax of $33 million.

There is no doubt that this organisation can afford to pay rates, it uses more facilities than most residents but is granted an exemption for no obvious reason.

The general power of the Minister to exempt land from rates should also be removed, or at the very least codified.

With my old Pilbara hat on, I note that the state government condemned Pilbara local authorities to ongoing financial crises by removing their ability to rate the biggest industry in the nation at anything other than unimproved value.

Some time ago, the then Minister Tony Simpson announced a "Gross Rental Value Rating of Mining Tenements Policy". Properly used, this policy has the ability to reverse years of funding shortfalls in the mining districts.

It would be criminal if, after all these years, this review did not enshrine that policy in legislation, because without such a change local governments in the mining areas of the state are doomed to ongoing financial problems.

Rating is the lifeblood of local government and the current system is complex, inefficient, confusing and expensive to administer and I am not sure whether rating has been given the priority it deserves by these review processes.

Many of the current regulated and legislative requirements related to rating are dated, inefficient and the artificial divisions created are counterproductive for effective government.

The division between unimproved value (UV) and gross rental value (GRV) defies logic and raises many iniquities. When farming was largely a family business that

underpinned the economy of the state, rating rural land at a lower rate may have been a justifiable thing to do.

Now that huge international corporations are major agribusiness players, why should this benefit be perpetually legislated?

For example, why should a giant multinational farming corporation with extensive developments on its farmlands pay rates at the lower unimproved value (UV)?

Clearly the land is improved.

Clearly they can afford it and clearly they use local facilities.

This is a complex area of the review process and a separate committee should be established to start afresh by seeking the optimum outcome for local government and it should include assessing the value or otherwise of a legislated general power to levy rates for any purpose and on any basis.

Such an initiative should be aimed at ending the expensive and anachronistic Valuer General provisions. They should seek to allow annual flexibility and allow ability for differential rates under distinct circumstance and allow for rates to be struck based on some system of identifiable and definable algorithmic values.

CURRENT ACT PROVISIONS THAT SHOULD BE RETAINED

As stated earlier, my strong preference is for a significantly smaller, less prescriptive law that establishes heads of power; defines roles, responsibilities and functions and puts in place a regulatory regime with enforceable accountability processes. The new law should also legislatively split the department as discussed earlier; remove the legislated monopoly of WALGA and establish the WAEC as the body to conduct elections in the manner outlined previously.

There are some provisions of the current act that warrant retaining, the major ones worthy of preservation are:

- S1.3 Content and Intent.
- S2.6 Local governments to be run by elected councils.
- S2.7 Role of council.
- S2.19 Qualifications for election to council.
- S2.20 Members of parliament disqualified
- S2.26 Election to council terminates employment with local government
- Div 7 Commissioners
- SDiv 3 Powers of Entry
- S3.59 Commercial enterprises by local government (with modifications)
- S3.60 No capacity to form or acquire control of body corporate
- Div 4 Regional local governments and regional subsidiaries (with mods)
- Div 6 Disclosure of financial interest (with mods)
- Div 8 Local government payments and gifts to its members (with mods)
- S6.14 Power to invest

- S6.21 Restrictions on borrowing
- Part 8 Division 4 – Misapplication of funds and property

CLOSE

Modern democracies depend on checks and balances to achieve the best outcomes for the public and the sad truth is that few of these are currently present in local government and to date, even less are being proposed through this review process.

I have made earlier comments about a number of overarching principles and themes that are absent from the local level; these need remedying and some of these concepts are poorly understood in this sector, but we do know that to improve civic outcomes there are no substitutes for sound and robust public processes.

Whether changes should be legislated or regulated, depends entirely on that major threshold decision on the type of legislation required. A smaller law with comprehensive aims, objectives, defined heads of power and tightly drafted demarcations between the differing roles and functions of the respective offices are the most desirable outcomes for a modern world.

However as expressed throughout this submission, my overriding concerns relate to the concerted efforts to allocate administrative convenience and bureaucratic power higher priorities than democratic outcomes.

If that were to be the outcome of this review it would be both dangerous and unacceptable.

Larry Graham
[redacted]