

Submission to Phase 2 of Local Government Act (1995) review.

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SUMMARY

1. All State Governments have sought to address under-performing local governments (LGs) but fail to correct the highest order **cultural & systemic** root causes.
2. WA's LG Act is ineffective at creating **governing bodies** that produce high level management policies.
3. An individual councillor's legislated **right to scrutinise** information is effectively unenforceable.
4. **Code of conduct** is too open to interpretation, and complaints are more often part of interpersonal one-upmanship than credible threats to LG reputation.
5. The **informal influence** and power of CEOs, if exploited, puts stability, the fundamentals of rule of law and due accountability at risk.
6. Councils don't have adequate access to independent **governance** and policy making advice.

1. CULTURE & SYSTEM

A WA council is typically a body of individuals with no binding ethos. As a result, it will be susceptible to divide and conquer strategies of corrupting influences. Especially if that influence is a CEO who has both autocratic control over all staff and sets the agenda for council. If a CEO decides to control rather than guide a council to resist effectively it would need to not only be strongly unified in its purpose but willing to take on a big workload. Indeed, if a council had that unity of purpose and work discipline a CEO would be unlikely to be controlling. The reality is however that few councils are and so the emergence of an authoritarian self-indulgent administration is a risk facing communities.

Once an authoritarian administration forms it will tend to perpetuate itself. All cultures inculcate their values and defend themselves against change. The community expectation is that councils are in control because that is a default in a democratic culture. Sub-cultures that hold opposite views to the core values of the larger culture that it exists in tend to be secretive and this is typically the way corrupt behaviour is hidden.

The WA Parliament is responsible for setting an appropriate balance between the power of a CEO and a council. The WA Constitution dictates that system of local governance should exist and, given the Act dictates that a council governs, then it follows that Parliament must ensure that the rule of law is not subjugated by the will of CEOs. Indeed, protection against the rule by individuals is what the fundamental principle of the rule of law is about.

Parliament should correct any way in which the LG Act (1995) or related Acts fosters an authoritarian sub-culture among LG staff or in related regulatory authorities.

2. MANAGEMENT POLICIES

Across Australia both sides of politics in state parliaments have sought to bring a sharper focus on efficiency and effectiveness in local governance. WA's 1995 Act put that as an objective and since then the Integrated Planning System, MyCouncil website reporting and Amalgamations have been tried; but without measurable success. Indeed, what the three years of aggregated macro performance data MyCouncil now provides shows is that variability between the staffing expenditures of LGs with comparable populations is almost always high. This variability shows that if there are any exemplars of efficiency and effectiveness in WA LGs, they are very unlikely to be the norm.

In 2009 the LG Act was modified to remove the word "direct" from the definition of a council's role in relation to its CEO and replace it with "govern". This change was a tightening up of a shift in approach begun in the 1995 Act to address the problem of councillors individually, as opposed to collectively as a formal resolution of council, giving direction to staff. An explanation for this tightening was given by then LG Minister Castrilli in the committee phase of the bill; that was that the change sought to have CEOs instructed by council at a "higher level". The way open to a council to direct at a higher level is to set policy.

The "higher level" instruction to CEOs that Minister Castrilli cited in 2009 is just not done in practice. This is readily seen by examining the policy manuals that most councils publish on their websites. What is done in the name of efficiency and effectiveness is perfunctory completion of the reports required by the Integrated Planning System that's defined in regulations (added 2011). The generalities and platitudes of these documents would not survive expert detailed scrutiny, but that scrutiny is never likely to happen by either part time councillors or the Auditor General's office which was given the entire sector to "performance audit" but not the resources to do the job.

Councils might set policies for their CEOs that require accurate comparison of cost centres with other LGs of appropriate size and demographics to create an effective motivation for better management, but they haven't. Understanding why that is the case and seeking an effective remedy should be a high order objective of this review.

3. RIGHT TO SCRUTINISE

The right of individual councillors to access LG information (CI 5.92) is in theory a fidelity mechanism that is independent of dominating voting blocs, evasive CEO's or even a sector sub-culture. This right to information is a common element of commercial, judicial and parliamentary accountability. Nevertheless, in LG this important mechanism fails because it cannot be affordably enforced. If a CEO refuses access to information a councillor cannot have that decision reviewed by either the State Administrative Tribunal or the Magistrates Court which are the only affordable and effective paths to a judicial review.

Accountability is a fundamental of any system of governance and parliament risks being judged to be seeking to mislead by providing a clause in the LG Act that ostensibly provides for it but in fact is neutralised by detail hidden away in other Acts. Allowing affordable judicial review provides a very effective aversion to corrupt behaviour whilst neutralising it has exactly the opposite influence. It's all risk and no credible advantage. It should be reviewed.

4. CODE OF CONDUCT

A defining attribute of LG in WA is that it is non-partisan. Notwithstanding that there is no accepted political theory to suggest that a two-party system is not the essential stabilising force against erratic populism that parliaments have institutionalised, it remains a popular local ideal. A natural consequence of assembling a group of disparate people into a council and putting their guidance in the hands of their employee is that from time to time human emotions will bubble over and silly things will be said. It's not unreasonable therefore to put in place a code of conduct to militate against this. However, the mechanism mustn't be a weapon that exacerbates rather than quells interpersonal silliness.

The review needs to assess whether the code is applied in a rational and balanced way that is addressing behaviour that is genuinely damaging to the good reputation of LGs. The code should also apply to CEOs relating to key systemic principles like equal access to information by councillors and arms-length dealings with them.

5. INFORMAL INFLUENCE

A fundamental of systems of state or local governance of all types, but especially a parliamentary democracy, is that sovereign power must be supreme, and its projection must be effective. Corruption of that will whether by individual or colluding participants in the system is always fought against. The LG Act contains bits of all the elements of the parliamentary armoury for that fight but lacks the contested vigour of opposition debate and questioning to call out perfunctory reporting and evasive obfuscation. This together with the limited time and talents of a part time council creates a fertile space for corruption, whether it be pragmatic compromise that is relatively benign or the sort that ranges from self-indulgence to stealing public money. The problem is that all corruption is as secret as it needs to be to continue.

The unchallengeable operational authority of CEOs allows them to have a huge influence on councillors who seek to be seen by electors to make operational things happen. Many CEOs encourage this despite the corruption risk of favour swapping. The Act does not make this mistake. Councillors including a mayor or president have absolutely no executive role under the Act, but this fact is never discussed, let alone promoted as a crucial systemic barrier to creeping corruption.

The important role council has as the LGs policy maker can and should be celebrated and respected. Instead councils tend to be buried in detail by their CEO who may well be understandably happy without high-level policies given that in the absence of such policies they are free to do as they wish.

The review should assess the exposure of the LG sector to accommodating relationships between Councils, CEOs and WALGA, which has grown by dint of legislative prescription to be a wealthy but unaccountable bureaucracy.

6. GOVERNANCE

The elephant in the LG chamber is the policy making limitations created by independent part time councillors who have their agenda set by their CEO; the employee they govern through.

It's not feasible to provide a council with the equivalent of services like The Office of Parliamentary Counsel, Parliamentary staff or Auditor General so they can be as wise formulating policies as a parliament might be considered. However, generally LGs are not obviously riddled with corruption. It is likely that residual ethics of Australian public servants has protected against that. So, despite the failings of the 1995 LG Act, competent CEOs generally guide their council to approve what's needed for governance that's tacitly accepted by their community. But this ignores the principle of accountable governance and fosters dilettante councils and ultimately corruption.

The rationale for seeking better outcomes from the Act has three obvious parts;

- All layers of government profit from politicians having a sound grounding in policy making (17 members of the current state government have been councillors). The LGs that become dysfunctional demean the sector.
- The variation of efficiency (up to 100%) shown by staffing levels of ostensibly comparable LGs on population, demonstrated by MyCouncil data, suggests that overall better results are possible.
- The principles of our system of government like accountability and the rule of law underpin our success and status in the world. They are the foundational ethic and the source of political power. Parliament is honour bound to foster them.

Goals such as those above are what good governance delivers but it might be that the easiest way to achieve efficiency and effectiveness is to do away with councils and put the money into staffing in the office of the Auditor General for detailed performance audits of CEOs reported directly to Parliament. However, the WA Constitution doesn't allow that, it requires elected local governing bodies. Making councils competent governing bodies is therefore necessary unless the Constitution is changed.

It's tempting to conclude that the LG Act needs a complete re-write but that's inherently risky and undervalues its Westminster roots and the trial and error experience accumulated using it. A safer approach is to simply address the causes of the key problems catalogued here, but to do so cognizant of change management principles.

It's the job of a review to establish what those improvements would be but it's not hard to visualise simple changes that would seem certain to have significant

beneficial effect. However, it's not unreasonable to predict that such changes would attract widespread resistance from LGs, associations and departments with often diverse interests but enough commonality to be loud and influential. Effective change management recognises that emotional responses matter as much as practicalities.

The suggested path forward is therefore to first invest in a better LG sector understanding of the governance wisdom hidden in the principles and conventions of the Westminster system and how all that has been cut down to be the core of the LG Act. That can be readily achieved by having LGs provide that education to their communities. The vast majority of electors would not choose to participate, but the ones that matter most will. There is no more effective way of being influenced by education than to teach.

Political ideologies from both left and right look past the inherent complexity of public administration, usually because of an unbalanced simplistic focus on either efficiency (the right) or effectiveness (the left). Further, when an ideologically based approach of either side runs out of puff there is inevitably a destabilising imbalance. Brexit and Trump show the destabilising effect of unmitigated popular opinion on governance. Fostering a view of the Westminster system as the rules base that has produced the most successful culture the planet has ever seen helps renew the selfless discipline of public servants that is required for governance to flourish.