Submissions provided for the 2019 Statutory Review of the *Local Government Act 1995*

Preamble

These submissions are made regarding the review of the minor breach complaints process with a view to simplifying the process, allowing for alternative dispute resolution and reducing the costs of the parties involved in the application for a review a decision of the Local Government Standards Panel (**LGSP**).

Reference has been made to how the current process applies in practice from the experience of a councillor who has recently been through the minor breach complaints process. A comparison with the process in the State of Victoria has been made to demonstrate how alternative dispute resolution could be incorporated into the minor breach complaints process to reduce costs and to promote dispute resolution between councillors in the first instance.

Review of Minor Breach Complaints Process

There is a need for a substantive review of how minor breach complaints are dealt with under the *Local Government Act 1995* (**LGA**) and the *Local Government (Rules of Conduct) Regulations* 2007 (**Rules of Conduct**).

At present the minor breach process involves a complainant submitting a complaint on a two page form without the requirement to attach documentation evidencing the nature of the complaint. The form should be extended to include a requirement to produce documentary or other evidence with the form to substantiate the complaint.

The role of the LGSP needs to be reviewed as the current process promotes decisions being made and sanctions being imposed without provision of adequate evidence to assist the LGSP in making a decision. A finding of minor breach poses serious risk to a councillor's reputation and wellbeing. There is a growing emphasis in supporting mental health in all sectors and this should also be applied in Local Government as the work undertaken is stressful and it is in public interest that these persons are supported in their roles.

Once the LGSP makes a finding of minor breach and imposes a sanction, the process for review involves a costly application to the State Administrative Tribunal (**Tribunal**), a proceeding in which the LGSP is unable to take part. The Attorney General can intervene in such proceedings on behalf of the State. It appears at present that it is a matter of course that the State Solicitors' Office becomes involved on behalf of the LGSP and the Intervenor. This comes at a further cost to the councillor who is seeking to have the decision of the LGSP reviewed. The SSO prepares a statement of issues and facts on behalf of the LGSP and a statement of contentions on behalf of the Intervenor to which the applicant is required to respond. The SSO, on behalf of the Intervenor, also prepares witness statements, attends the hearings and cross-examines the applicant's witnesses and this extends the duration of the hearing.

The following could be considered in the statutory review in relation to the minor breach complaints process. These suggestions are an effort to simplify the process, avoid unfounded complaints being the subject of a minor breach finding and to minimise the costs to the applicant in seeking the review of a decision:

(a) the Complaint of Minor Breach Form should be supported by documentary or other evidence or at least details of the other witnesses to the alleged breach;

(b) if other witnesses to the alleged breach are identified there should be a process by which the LGSP can contact these witnesses to request their assistance in reaching a determination;

(c) if the Complaint of Minor Breach Form is not supported by evidence then the LGSP should be able to dismiss the complaint without further consideration;

(d) the LGSP should be required to provide parties involved in the complaints process with information on how the process works (for example by providing every person involved with a copy of The Minor Breach System, A Guide for Council Members, Complaints Officers and Members of the Community), with an emphasis on the fact that parties should seek legal advice if they are unsure as to their position;

(e) the LGSP should have investigative powers, for example, the LGSP should seek to test the evidence before them and ask any person involved for further information, if required, before a decision is made;

(f) there should be an internal process of review before an application is made to the Tribunal, for example, there could be an extra panel or one senior member at the LGSP who can do a review of the previous panel's decision;

(g) it should be considered whether mediation or arbitration could be explored as a way of resolving complaints prior to the involvement of the LGSP and the Tribunal to save costs;

(h) the role of the Intervenor in such proceedings should be clarified, particularly as to whether:

i. the Intervenor is required to be involved in each proceeding – section 37(1) of the *State Administrative Tribunal Act* 2004 provides that *"The Attorney General may, on behalf of the State, intervene in a proceeding of the Tribunal at any time".* Correspondence received from the SSO in such matters indicates that the Attorney General intervenes as of right. Further a review of the recent cases demonstrates that the Intervenor does become involved in each proceeding;

ii. if the representative for the Intervenor does deem it should be involved in a proceeding then it should, after considering the further evidence adduced, be required to:

a. consider the option of withdrawing from the proceeding if there is merit to the application for review or concern regarding the original decision of the LGSP; or

b. provide a report to the Tribunal of the matters the Intervenor advises it should consider rather than proceeding to be involved in a hearing;

iii. the Intervenor has an obligation to limit the issues in contention at the earliest opportunity to save costs;

iv. the Intervenor is under the same obligations as other parties to be a model litigant;

v. costs awards could be made against the Intervenor if it fails to conduct itself appropriately.

The Process in the State of Victoria

In Victoria each council is required to adopt a code of conduct which must include an internal dispute resolution procedure for disputes between councillors. The procedure is also required to allow for the appointment of an independent arbiter to consider alleged breaches of the code in order to make a final determination.

Each council can provide for individual sanctions for breaches to the code and these must be voted on by council as a whole.

Categories of breaches are defined as:

- Misconduct;
- Serious Misconduct;
- Gross Misconduct; and
- Criminal Prosecution.

Misconduct may include a councillor failing to adhere to a sanction imposed in the internal resolution procedure or if there are multiple breaches of the code. A breach labelled as misconduct may be referred to a Councillor Conduct Panel.

Serious Misconduct includes the failure to comply with a sanction imposed by a Councillor Conduct Panel, bullying and breaching laws that relate to the proper functioning of council among other things. These matters can be referred to a Councillor Conduct Panel which also has discretion to refer the matter to the Victorian Civil and Administrative Tribunal (**VCAT**).

Gross Misconduct is the most serious and can only be referred to VCAT by the Chief Municipal Officer as the head of the Local Government Inspectorate.

There is a Principal Councillor Conduct Registrar (**Principal Registrar**) who oversees the establishment of the panels and the complaints process. Applications for misconduct and serious misconduct are first received by the Principal Registrar who will establish a panel if they are satisfied that the application is not:

- frivolous;
- vexatious; or
- without evidentiary basis.

The Principal Registrar provides guidance to the Councillor Conduct Panels and ensures the system is open and transparent. The Councillor Conduct Panels comprise one lawyer with at least five years legal practice experience and another person with relevant expertise. The VCAT can review decisions made by a Councillor Conduct Panel. Section 73 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides for the Attorney-General to intervene on behalf of the State in a proceeding at any time.

Conclusion

The Minor Breach Complaints Process should be reviewed with reference to the matters outlined at (a) to (h) above.

The Victorian model could be of assistance as:

a) it appears to allow for applications that are frivolous, vexatious or without evidentiary basis to be dismissed before a panel is convened;

b) there is provision for an internal dispute resolution process and for the appointment of an independent arbiter;

c) the Councillor Conduct Panels can be established as required and may therefore include a wider variety of persons on each panel; and

d) the Principal Registrar appears to be able to choose a person with relevant expertise related to the particular complaint as well as a person with legal experience to form the panel.

It is noted that the Victorian model only allows for two persons on the panel and that having at least three persons on the panel is preferable to avoid deadlock. Further, it appears that the Victorian Model has the same process for the Attorney General to intervene but no guidance could be found on how or when the Attorney General should intervene in matters involving misconduct of councillors.

Submissions provided for the 2019 Statutory Review of the *Local Government Act 1995*

Preamble

It should be considered whether a policy on bullying and harassment within Local Government should be introduced or incorporated into the mandatory code of conduct for each council. The introduction of such a policy should be with a view to educating councillors, council staff and members of the public as to inappropriate behaviour, the consequences and how any disputes can be resolved. Such a policy will also demonstrate a commitment to protecting any person involved in council business from bullying and harassment.

Policy on Bullying, Harassment and Offensive Behaviour

There is a need for a policy on bullying and harassment within Local Government for the protection of council members and members of the public as a whole. This policy should include:

(a) definition of harassment;
(b) definition of bullying;
(c) training for council members regarding the policy (this could be included in overall health and safety training);
(d) where to get assistance for harassment or bullying;
(e) references to the related legislation;
(f) a process for the informal resolution of complaints;
(g) a process for the formal resolution of complaints;
(h) potential outcomes in the above processes outlined in (f) and (g);
(i) the process for review of the policy; and
(j) the circulation of updates to the policy.

Definition of Harassment and Offensive Behaviour

See the following legislation for definitions:

- section 28A of the *Sex Discrimination Act* 1984 (Cth);

- section 18C of the *Racial Discrimination Act* 1975 (Cth);
- sections 35, 37 and 39 of the *Disability Discrimination Act* 1992 (Cth);
- the *Age Discrimination Act* 2004 (Cth); and
- Division 3A and Division 4 of the *Equal Opportunity Act* 1984 (WA).

Measures should be taken to support the wellbeing and mental health of every councillor, staff member and member of the public involved in council business. It is in the public interest that councillors be able to undertake their duties without fear of harassment or bullying. Local Government should seek to provide a safe environment for council members to promote a positive contribution to their position for the benefit of the public and to also encourage longevity of service.

Definition of Bullying

Offensive, hostile or oppressive behaviour which need not be related to the equality grounds (race, sex, age and disability). Such behaviour creates a risk to health and safety and may be motivated by jealously, personal dislike, revenge or insecurity.

See section 789FD of the *Fair Work Amendment Act* 2013 (Cth).

The Position in the State of Victoria

Serious Misconduct includes bullying of councillors and council staff. As mentioned above, in Victoria each council is required to adopt a code of conduct and these codes of conduct may also deal with issues of bullying and harassment.

For example, the Code of Conduct of the City of Greater Geelong dated 27 February 2018 includes the following provisions relating to bullying and harassment:

At paragraph 3.2 – Role of a Councillor

"Councillors refrain from personal attacks or conduct that demeans, bullies or vilifies other Councillors, Council officers or members of the public, ensuring a focus on the issue at hand"

At paragraph 3.2.2 – Positive Duty

"Councillors have a positive duty which requires action that educates about, and prevents, unlawful discrimination, harassment, victimisation, vilification and bullying"

At paragraph 3.6 – Relationship between Councillors and Council Officers

"Councillors will avoid engaging in any form of inappropriate or intimidating behaviour, including discrimination, harassment, bullying, victimisation or vilification."

At paragraph 5.13 – Unlawful Conduct

Discrimination, harassment and bullying are defined and outlined as being unlawful in this section.

At paragraph 6.2.14 – Arbiter Must Refer Certain Conduct Complaints

"An Arbiter, after examining a Conduct Complaint, must not hear, or continue to hear, the matter if the Arbiter is satisfied, on the balance of probabilities, that the Conduct Complaint constitutes misconduct or serious misconduct involving…. Bullying of another Councillor or member of Council staff by a Councillor"

Conclusion

A policy on bullying and harassment should be implemented to protect councillors, council staff and members of the public. It will assist councillors and other persons involved in council business to understand what type of behaviour is considered to be bullying or harassment and demonstrate that such behaviour will not be tolerated.

Such a policy will provide a further benchmark for the standard of behaviour expected of councillors. It is noted that amendments are being made to the *Local Government Act* 1995 to make it mandatory for each council to have a Code of Conduct that applies to all council members and candidates. It is suggested that a policy on bullying and harassment could either be included as a requirement in the

mandatory Code of Conduct for each Shire or be a stand-alone policy that applies State wide.

Avon Legal on behalf of Councillor Stephanie Penn
28 March 2019