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The Secretary
LGA Review
Department of Local Government, Sport and Cultural Industries
PO Box 8349
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2017-2018 Review of Local Government Act 1995
Community Expectation Submission - Phase 1

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Other References:

- Local Government Act, 1995, Review – Phase 1 Consultation Paper
- Australian Corporations Act
- WA Constitution Act 1889 – section 52
- Hilmer Prof., *National Competition Policy Review Report,* 1993
- Walker G de Q, *The rule of law: foundation of constitutional democracy*, (1st Ed., 1988)
- Rule of Law Institute of Australia - https://www.ruleoflaw.org.au/principles/
- Pearce DC & Geddes RS, *Statutory Interpretation in Australia*

1. Foreword

In brief, I understand the Minister identified;

1.1. "*The review will be undertaken in two phases. Phase 1 of the review considers the following matters*:

1.1.1. meeting community expectations of standards and performance

1.1.2. transparency

1.1.3. making more information available online

1.1.4. red tape reduction."

And

1.2. "*to modernise local government, empower and enable local government, meet community expectations for accountability and transparency, and relieve regulatory burden*"

And

1.3. "*powers and responsibilities for local government to be addressed in regulations rather than a prescriptive Act*"

And

1.4. "*restore the reputation of the sector, simplify regulation and improve services*"

2. Introduction

This submission is a private submission of my "*public expectation*" experience over more than 50 years. It is not aligned to any, body, politic nor religion, and is the personal experience knowledge and views of the signatory to this submission. This submission may be published to the public in its entirety.

This submission identifies and discusses "*community expectations*" divergent to "*regulatory convenience*" or political whim with a major focus on the pre-establishment of a sound framework as being critical to the success of this legislation. (see p10 for Framework diagram)

The need for this direction is exampled through the Minister's identified (page 9) [four] matters of Phase 1 of this Review which are clearly intertwined in such a manner that whatever is constructed across any one, will impact directly on the competence of provisions managing the others. Essentially all four are performances of which the <u>measure</u> delivers the Community's perception toward competence and integrity of the Local Government.

Build a framework that is positive and encouraging and people will promote harmony in enhancement of society. Maintain the current framework that is negative, dictating and based on compliance through intimidations and the status quo will remain.

The current legislation retrospectively applies its controls in a manner that is actively destructive of management competency, thus leaving the majority of the existing legislation and regulations effectively unenforceable to the object and purpose of the establishment and conduct of Local Government.

2.1. Understanding terminology

2.1.1. In practice it can be seen that autonomy and accountability are symbiotic terms with accountability simply being the measure of the degree of autonomy permitted. Both practices are limited by artificially imposed boundaries. Within the Local Government Act the boundaries are heavily prescriptive. In the Corporations Act the boundaries are significantly outcome based.

2.1.2. Oversight is a fear of autonomy and the way in which accountability is controlled to sustain imposed boundaries. In simplified example; Local Governments conduct oversight of legislative compliances within their district, while the Police conduct oversight of Local Government enforcement officers followed by the Courts conducting oversight of the Police finishing with the Parliament conducting an oversight at every level. In between levels there is also a public oversight conducted through various complaint management processes.
How much more oversight is required while the current message delivered is that no one can be trusted – not even the overseers?
While there is also a small degree of Community oversight, this is frustratingly toothless thus contributing to the disinterest in community engagement across Local Government.

2.1.3. "Performance" and "good government" under the current legislation are undefined and unenforceable terms enabling vague and subjective opinion in an unmeasurable form which then opens room for conflict through enabling of interpretations created to suit the will of persons in positions of power.

2.2. Spectrum of Laws and Legislation

The DLGC alone, lists 13 Acts it administers, and there are some 4,074 current "*Local Laws*". Such a plethora of laws is overwhelming to the point that such a prescriptive combination has lost the capacity to lead and guide the Community and through that now fails to engender understanding by the Community.

The Review Consultation Paper notes;

"*This review is examining all of the legislation that sets the framework for local government: the Local Government Act and the twelve sets of regulations that underpin it.*"

But does not name those 12 sets of regulation and nor does the Review revisit the "object and purpose" of all those laws. The style of guidance questions does however appear to facilitate construction of further prescription.

"*To meet contemporary community expectations, local governments need a contemporary legislative framework that provides boundaries for their operations.*"

"*While the Act establishes local government and the key rules for its operation, this Act is just one of many legislative instruments administered across multiple portfolios that inform how local governments conduct their business. For example, local governments' role in planning is defined in planning laws and their role in public health matters is defined in the Public Health Act 2016. Some of the matters raised in this review may therefore impact other legislation.*" (Review Paper, page 11)

If the Constitutional purpose and object of having a Local Government is to govern; then why is there an overwhelming and increasing prescription being applied to prevent the Local Government from complying with the WA Constitution?

And

"*Modernising the legislative framework by which local governments operate is a complex task.*" (Review Paper, page 12)
However, the Review Paper is mute on what those "other" laws and legislation are, or how they impact on the functions of the Council or the Local Government administrators.

This leads a number of questions;

- If "*this review is examining all of the legislation that sets the framework*", then how many and what are (name) the legislative instruments and regulations administered or otherwise applicable to Local Governments? It is curious that a review of these items does not include those items?
- To what extent would "red tape" efforts and processes be reduced by simply providing a single source accessible listing, of existing laws applicable to or administered by Local Government?
- To what extent would complaints, disputation and their investigatory processes be reduced by simply providing a single source accessible listing of laws and legislation applicable to or administered by Local Government?
- How can Councillors competently address "policy" when they do not have open knowledge or simplified access to all applicable laws and legislation which affect or are affected by their determination of that policy? Councillors are responsible for policy and performance yet these tools critical to those responsibilities are not currently readily available to them.
- 4,000 plus, current Local Laws highlights dysfunction across consistency in Local Government causing confusion to the Community. How many of these are duplicated and could be replaced by a single consistent standard or better served through an 'Industry Code of Practice'?
- Would the simple Act of placing the plethora of Laws and Legislation in the public view cause a simplification and reduction across those Laws and Legislations? Bearing in mind that any law not known to or fully understood by the public cannot be expected to be upheld by the public.

2.3. Framework Matters;

The Introduction to this review commences with the quotation;

"*The Local Government Act 1995 (the Act) provides the framework for Western Australian local government. Local governments are created by the Act which sets out the functions, responsibilities and powers of local government.*"

And

The Minister says this review is to; "*modernise local governments and better position them to deliver services for the community*"

Yet

The Local Government Act describes a Local Government which is non-compliant with the West Australian Constitution Act, the establishment law for enabling the existence of Local Government Act. and

The Review Consultation Paper focuses dominantly on "tweeking" existing prescription and fails to address the fundamentals of construction of a framework to "*meet community expectations*" of compliance with the Constitution Act.

And

That "*Community expectations*" had not been identified nor measured for this review is evidenced by the;

2.3.1. absence of "community" from consultations listed;

2.3.2. absence of public workshops from local government districts with current and past disputation. The spread of workshops that were held was discriminately biased;

2.3.3. inclusion of numbers for complaints but not the substance nor analysis of substance of the complaints;

2.3.4. comparison of WA legislation with legislation in other States but no comparison of "*Community Expectation*" across WA nor those in WA with that in other State.

How is the review going to be capable of delivering to "*Community Expectations*" when the majority consultations are those with vested interest in maintaining powers of dictatorial control over the Community in place of; "*for the better government of the area in respect of which the body is constituted*" (Constitution Act)?

2.4. Intention of the Local Government Act;

2.4.1. In contradiction to the voiced intention of the current Act (section 1.3), the framework of the current Act is retrospective, quite draconian and perversely political in its attitudinal structure through, amongst other things, enshrining power and control to those employed to administer in the name of Local Government over those elected. The current framework does not facilitate nor does it deliver, capacity to identify measure nor enforce "*community expectation*".

2.4.2. The belatedness of current enforcements renders them as dysfunctionally inconsequential to the maintenance or enhancement of standards.

2.4.3. It is very clearly an inadequacy of the framework of the Act itself which has delivered the current "*public expectation*" revolt causing the high cost in resource commitments given over to investigating complaints.

2.4.4. Placing "*prescriptive options*" for this review to the parties consulted, appears to have been an exercise in denial of the intention to introduce "*public expectation*" and insert in its place further and additional capacity to install prescription for control conveniences of those parties listed as consulted or their employed members. In this respect, proposals within phase 1 of the review are very much "back to front", in designing a horse to pull the cart, instead of designing a cart to suit the capability of the horse!

2.4.5. The "*community expectation*" of legislation is that it shall be clearly understandable to those impacted by it. And If any member of the community does not readily understand the Local Government Act in its entirety then the Act is a failed instrument and that a community cannot be expected to and nor will they comply with it. The current issues with the application of the existing Local Government Act are directly caused by the framework style of the Act being unsuited to contemporary society.

2.4.6. The purported unreasonableness of disputation claims and similarly the purported unreasonableness of decisions given, remains subjective and hence divisive while the content of the Local Government Act remains unmeasurable and unmeasured against its purpose and object. For example; The Act does not define performance and the Act does not enable performance to be measured and without these it cannot be managed. And; Last but not least the Act does not facilitate enforcement of performance. That leaves performance, which is a legislated responsibility of Council, as nothing more than a word without value or substance.

I. Solution to Identify, Measure and include "community expectation";

The single most significant and fundamental failure in the Legislation underpinning the ability to manage and hence enforce its provisions, is the absence of any capacity to measure. Without capacity to measure, many of the words and terms used throughout the Act have nothing but subjective value and hence as demonstrated since 1995, are incapable of enforcement. The framework of the Act itself is dysfunctional and must therefore be addressed in priority to establish a framework that, in itself, identifies and leads capacity to measure and from that, deliver community expectation.

a. The Act should clearly identify what is intended by "*Community Expectation*";

b. The Act should clearly identify how "*Community Expectation*" is measured;

c. The Act should clearly identify how enforcement of the Act, regulations, municipal bylaws, policies, practices, standards and performance; is seen to be achieved to "*community expectation*".

- The identification, measuring and enforcement of "*performance*" must be similarly addressed in the Act.
- Addressing "*community expectation*" in this way will also contribute to the identifying and reducing of "red tape" in addition to simplifying many of the other time-consuming matters.

2.5. **Confusion caused by and in Legislation**

2.5.1. The Local Government Act 1995 makes what reads to be an unconstitutional establishment of Local Government Bodies as "*Bodies Corporate*" where in section 52 of the "WA Constitution Act 1889", the legislated enabling clauses requires Local Governing Bodies to be elected. The framework of the current (1995) Local

Government Act then deviates even further by effectively delivering control of the elected Council to the employed CEO.

II. Solution to Unconstitutional definition of Local Government

The Local Government Act needs to clarify that the "*Local Governing Body*" is the "*Council*" and then to enable that *Governing body* to set up an "*Administrative Corporate Body*" to fulfil operational matters required and directed by the *Governing Body*.

2.5.2. Section 2.5 of the 1995 Act identifies that a Local Government is established as "*a body corporate*" yet Local Governments are managed through legislation (Local Government Act) significantly differing from private sector corporate legislation and in some cases are specifically and unreasonably exempted from private sector legislation. This Phase 1 review also offers suggestions and options which if implemented would take local government and their administration further from consistency with the private sector law. The confusion this creates detracts from simplicity of administration and widens the gap to "*community expectations*". "*Community Expectations*" in many aspects of business integrity and behaviour standards are long established and well tested in corporations' legislation.

III. Solution to: Confusion from Duplication in Legislation;

Where practicable, the Act should draw in at least the Australian Corporations Act and regulation provisions to deliver those areas of tested "*community expectation*" across the structure, duties and performance of *Local Government* or specific personal positions.

- In combining these legislative instruments, confusion of expectation from *Administrative Local Government* to private enterprise will be lessened. Conviction of offence in one place is also then transferable across the other so in this respect increases the perception of value in compliance and so contributes to a lessening of enforcement workload. And notwithstanding that the content size of the Local Government Act could also be reduced.
  - To achieve this, three things need be included;
  - the transference would be subject to "*except where contradicted by this Act*" as is used in similar instances; And
  - clearly defining terms used such as any specified similarity/difference between shareholder and resident/ratepayer or Director and Councillor; And
  - For any enforcement proposed or practiced; achieving "*community expectation*" must be a demonstrated component of any decision so made.
- If Local Government Administrative components are to be truly empowered as "bodies corporate" then they must also be subject to at least the same governing laws as any other corporate entity. The only time exemption should be a consideration is the rare cases of where compliance can be demonstrated to cause detriment to "*community expectations*".
- Continuing to fail to endorse compliance with private sector legislation will contribute to a multi-tier system furthering confusion across law.

2.6. Learning lessons from other similar reviews;

When exploring outcomes from other jurisdiction reviews, it is easier to fall into the same traps and adopt failings than it is to extract transferable benefit.

The outcomes from this review are no different to any other review in as much as it is steered by the guiding questions asked, and not by an unimpeded development of "*community expectation*" outcome enhancibility.

Australian Governance is seen by the general public as having a reputation of dominantly bullying and intimidatory by nature in place of observing the "Rule of Law" philosophy, so there is a high danger that in following the example of other regimes, transference may well be destructive of "*community expectation*" though delivering greater exclusion of community.

The original intentions expressed in the WA Constitution Act of 1889 provide a more valuable guidance that the tabulations on other jurisdictions.

> "*the law should be such that people will be able (and, one should add, willing) to be guided by it.*" Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy*, (1st Ed., 1988)

3. Other Matters

3.1. **Increasing Participation** is supported through;

3.1.1. All meetings (including Council Meetings) should be subject to the "Chatham House Rule"

> *Chatham House Rule*
> *"When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed. The rule is designed to increase openness of discussion of public policy and current affairs, as it allows people to express and discuss controversial opinions and arguments without suffering the risk of stalling their career or even dismissal from their job, and with a clear separation from the opinion and the view of their employer. The rule allows people to speak as individuals and to express views that may not be those of their organisations, and therefore encourages free discussion. Speakers are free to voice their own opinions, and to contest the opinions of other participants, without concern for their personal reputation or their official duties and affiliations. The Chatham House Rule resolves a boundary problem faced by many communities of practice, in that it permits acknowledgement of the community or conversation, while protecting the freedom of interaction that is necessary for the community to carry out its conversations. It is designed to reduce the risk of what has come to be described as groupthink, where unpopular views are excluded from discussion, reducing the range of opinions an organisation can discuss.*" (Wikepedia)

3.1.2. Limiting to two (2) consecutive terms in an elected office. Some Elected persons command a "gerrymander" enabling them to continue on Council for thirty years or more without general constituent support. Such longevity actively discourages the participation of others. The Robson Report of 2012 also recommended limiting terms. In this respect, two terms as a Councillor should not disqualify that Councillor

standing for election as Mayor but after two terms as Mayor must be disqualified from standing for any Local Government elected position for the next two terms.

3.1.3. Facilitating Councillor consultation with their constituents. The experience in my Local Government is that Councillors have been directed by the CEO not to engage with their constituency. This is a clear example of the unconstitutional reversal of Governing roles established in the 1995 Act.
Each councillor should be required to engage publicly with their constituents at least 4 times per year. Without such consultation the Councillor is not recognisable as representing the views of his or her constituents.

3.1.4. Strengthen the directive to consult local residents before changes are authorised and implemented. Examples include, requiring plebiscites within a specified boundary before major change approvals can be confirmed. Ie high rise building in non-high rise area, reallocation of public space to commercial use, ie wave park.

3.1.5. Demonstrating through measuring; the valuing of volunteers as employees for the use of plant and equipment.

3.1.6. Valuing local based volunteer groups before non-local based groups in environmental management.

3.1.7. Using volunteers for identifying or measuring "*community expectation*" on proposals.

3.2. **Responsibility, accountability and transparency in respecting the "First Australian's"**
The **First Australians**, link in Local Government and the districts they serve is woefully excluded. There is a great deal of Indigenous knowledge available to assist in protecting and preserving the liveable environment and which is generally ignored by Local Governments whom currently favour less suitable imported European standards.

The Act should require Local Governments to be transparent and measured, in accounting of their responsibility to Indigenous knowledge.

3.3. **Separating Governance from Service Provision**
In 1993 Professor Hilmer reviewed and reported on a National Competition Policy. A key finding identified that conflict of interests existed in Government businesses and that separation between matters of governance and delivery of services should be encouraged as a means of enhancing transparency in fair trading. Those conflicts of interest remain strongly entrenched through the 1995 Act in Local Government service provision.

Extreme care needs to be taken to ensure that the current monopoly held by Local Governments does not profit those conflict of interests between rules & policies developed and commercial services delivery.

IV. Solution to; Conflict of Interest in Service provision.

Local Governments should be encouraged to make greater use of private sector businesses to provide competition in services such as at least;

- Waste collection and disposal
- Road construction and maintenance
- Public halls, libraries and sports venues management and maintenance
- Pest and vermin control
- Parks and playground installation, maintenance and their implementation planning
- Natural Areas rehabilitation and protection and their implementation planning

There should be no impediment to a person serving on Council and being a party or employee of a private contractor providing service to an Administrative Local Government. Particularly in smaller remote Local Governments where access to competition is limited. This must of course require a "*community expectation*" validation test and some form of follow up audit demonstrating continuity of "*community expectation*".

3.4. Defining Roles (Review Paper, page 18);

The remarks of then Minister for Local Government in his second reading speech in 1995 regarding avoidance of "*conflicts caused by uncertainty*" have not been realised.

The Council is now very much seen simply as a "rubber stamp" for the combined will of the CEO and Mayor. The example in my Local Government is that any Councillor who opposes the Mayoral decision has been subjected to disciplinary actions in clear attempts to silence opposition. One such example included, the presenting by both the CEO and Mayor, of falsified evidence to a magistrate's court. While the Councillor survived that attack, there remains no consequences for the falsifications delivered to the Court.

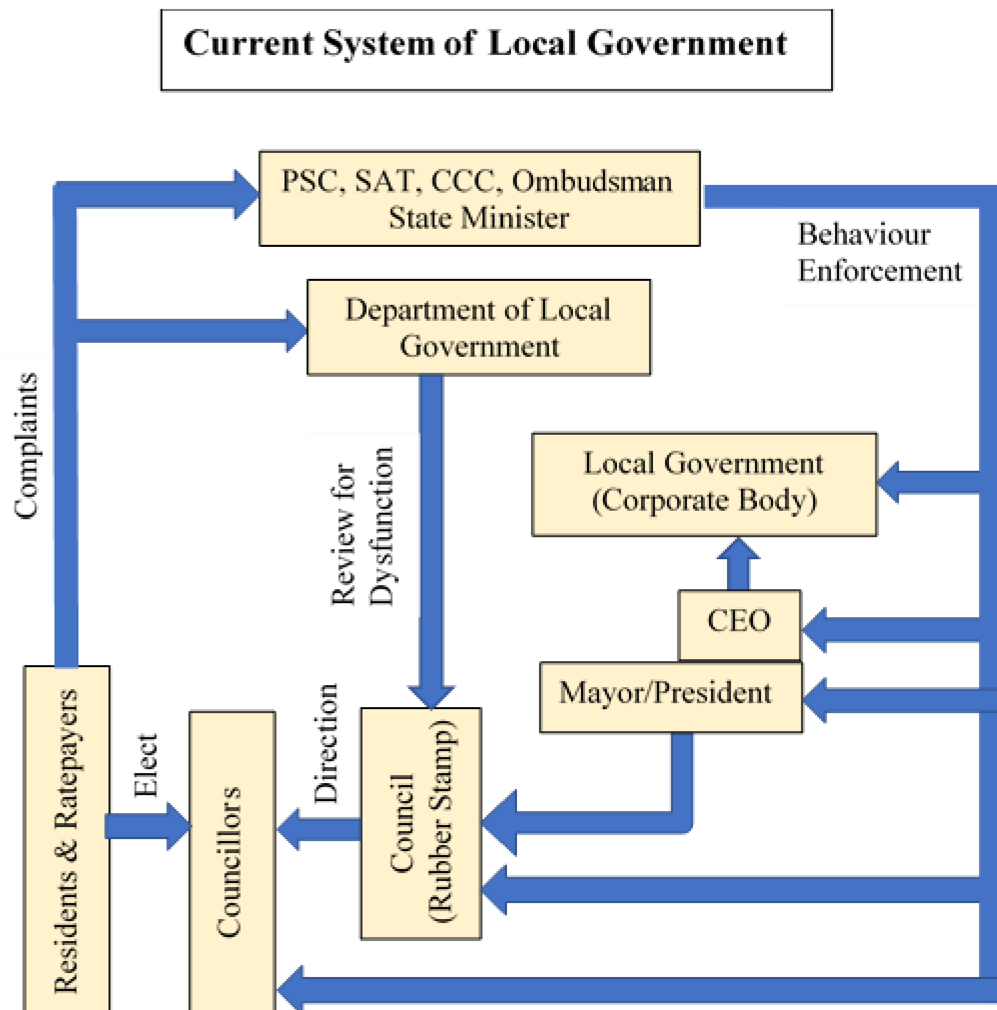
3.4.1. The Role of Council and the Role of Councillors remains very poorly understood with no guidance as to what defines these roles or how compliance with these roles can be measured. This has left the CEO a free hand to dictate what is or is not a Council or Councillors role. Under Corporate legislation, it is the role of the Chairman of the Board (Mayor) who directs the CEO as to the Board's wishes (Policy). Under the Local Government Act this role is reversed and the CEO dictates to the Mayor what decisions the Council will make.

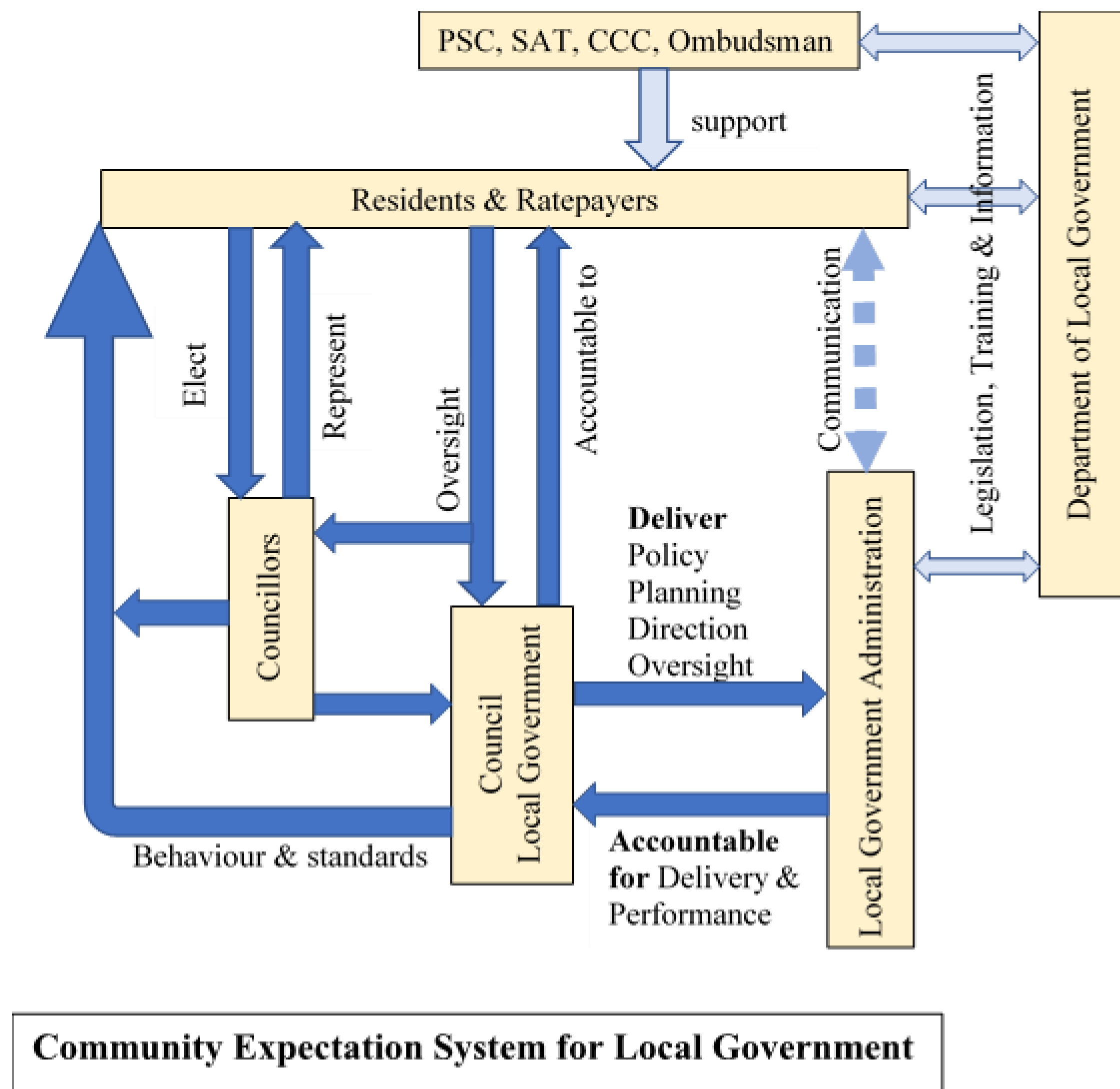
3.4.2. Similarly and despite their inclusion in the Act as roles belonging to the Council, it is the CEO who drives and controls the information relating to "*the performance of the local government's functions*" and the "*determining of the Local Government's policies*" This has delivered to the CEO an unhealthy control over the Council and Councillors. It is for exactly the prevention of this consequence that the Corporations Act requires its Directors to be individually responsible for the collection and validity of information they rely on when making a decision. The diagram shown on page 19 of the Review Paper is flawed as it retains the capacity of the CEO to manipulate the Council in an unbalanced manner. That diagram also omits the capacity for members of the Council to independently obtain or verify information held or produced by the administrators. The diagram is further flawed as it totally excludes the community

thus reinforcing the power of the Administrators. The process proposed in the review paper, is unlikely to deliver clarity or benefit to Local Governance.

3.4.3. Councillors under the current legislation are in stark contrast to Corporations Legislation, unable to be held accountable for their due diligence in decision making. This create a "*Community Expectation*" conflict, in ethics failure which is currently unresolvable. Current legislation prevents Council decisions from being quantitatively measured for due diligence competence; thus allowing biased political decisions to be sustained in contradiction to the Constitution Act.

3.4.4. "*The separation of powers between the legislature, the executive and the judiciary*" is a key principle of a rule of law philosophy. Under the current Local Government Act the legislature, executive and judiciary can be all the same person or people. This legislated confusion is a contributor to complaints, conflict and their being spread across multiple bodies and agencies. The Act and all its supporting mechanisms must be repaired to ensure clear definable separation between legislature, executive and judiciary.





Community Expectation System for Local Government

3.5. **Missing Role of Local Government;**
Local Governments should be required through legislation to play a greater leadership role in the district management of community environment from harmful vermin, feral birds, animals & plants and weed species. Particularly where these pests travel, nest or flourish across multiple properties or public spaces thus restricting or otherwise preventing private citizens ability to contribute to management or eradication.

3.6. Examples include; weeds listed as "Weeds of National Significance" such as Blackberry & Lantana, and similarly for feral pests such as; cats, foxes, lorikeets, corellas, rats, fruitfly and other invasive weed species.

3.7. The local experience in my district is that natural bushland classed as "bushland forever" is being rapidly lost to invasive weed species despite the volunteer effort funded through State Government grants. Also, backyard fruit crops are increasingly being lost to flocks of alien bird species. And further that the weed species and alien birds are jointly contributing to a visible reduction in native birds and animals thus degrading the community environment.

a. **Solution to; Clarity in Roles;**
The Act should facilitate a member of Council's ability to access information other than that produced or controlled by the local Governments Administrators.

The Act should reference Corporations Act provisions and should delegate to Regulation, clarification of the defining of;

a. What is a “policy” and what is covered by “policy” and how the efficacy of policy may be measured/assessed and enforced.

b. What is “performance” and what constitutes measurement/assessment of performance.

c. What enforcements are available to ensure or deliver performance compliance or improvement as required by the Council.

d. Clarification of what constitutes “*involvement in administrative matters*” as different to obtaining of information for the purposes of making of duly diligent decisions or raising of a matter to Councils attention.

e. “Due diligence” as a component of a member of the Council’s obligations.

3.8. **Disputation and complaints;**

3.8.1. The Review Paper guidance questions (pages 50-54) and the need for a “Standards Panel” become redundant when the solution below is adopted as a component of a framework delivering to “*Community Expectations*” discussed throughout this submission. Most of the questions on pages 50-54 are to the favour of the power of enforcers and hence fail to contribute to the engendering of governance harmony or community leadership and may actually cause further detriment.

3.8.2. The 1995 legislation fails to provide any comprehensive system or process for receipting and managing complaints and which then enables complaints to be escalated to disputation resolution management. Three issues clearly currently exist;

- A systemic process design failure delivering the enabling and facilitating of imposing of avoidance of resolution;

- A system complexity across jurisdictional segregations disabling functional resolution ability.

- A legislative framework failure to identify any process to analyse complaints and disputes for upgrading legislation (executive) to “engineer” out causes.

3.8.3. The omission of testing for the three Objects and Purposes, (given in Solution I above), from enforceability in Section 1.3 of the Act is explicitly exampled in the past workload and difficulty experience by the various parties of Courts, SAT, CCC, Ombudsman, DAP and others in their dysfunctional attempts to resolve disputation arising from complaints.

3.8.4. The failure of the State Administrative Tribunal (SAT), CCC, PSC or Ombudsman to prosecute, or achieve prosecution of a complaint has not proved unreasonableness of a particular claim nor the nonexistence of misconduct but does highlight a systemic dysfunction in the tools and preparedness to deliver assurance of “*community expectation*” resolutions.

3.8.5. None of these organisations are subject to commercial or other measurable scrutiny so their efficacy is unidentifiable. SAT is a poorly constructed body hamstrung in its ability to deliver sensible or enforceable outcomes. And any complainant to SAT is required to pay an upfront penalty greater than that which the offender is ever likely to receive.SAT has a public reputation as being inefficient and ineffective and had delivered at least one decision it probably knew was frivolously sought for the express purpose of bullying and intimidating. CCC is constrained in ability by restrictive legislation and highly politically biased interpretation. PSC is highly introvert and politically influenced, more often than not, delivering standards well below public expectations.

3.8.6. Prescription is only valid for the event or instance it was designed for. In the absence of definable identity, measure and enforcement of "*Community Expectation*" the above parties are forced to seek out literal prescription to base their judgements upon. Those overly legalistic judgements have in many cases simply aggravated the community or individuals through failing to meet expectations. The review currently risks a continuation of that position through addressing prescription instead of fundamental framework capability.

3.8.7. There is currently no authority or capacity to prosecute for "*falsification of records by public officer*", as exampled at 3.4 above, or of official minutes by a CEO or other public officer and many other 'offences' either bringing the Local Government into disrepute or serving to enhance the power of a "public officer". In such cases, residents and ratepayers should have legislated oversight authority to instigate an investigation or prosecution. Such an authorisation can be very easily controlled in simple regulation and in a manner as would deliver significant reductions in public cost or public resources.

3.8.8. Professional business practice across the world dictates that actually delivering resolution to complaints increases an organisation's value; whereas simply managing out complaints as practiced in the WA local Government realm in recent years has openly proven to be destructive of functional governance.

3.8.8.1. Complaints enable and facilitate improvement because they identify where an organisation can grow and so deliver profit sustainability;

3.8.8.2. Administrative Local Governments hold a monopoly stranglehold so complainants have no option but to continue till a resolution or retribution is achieved. While there remains no available alternative to dealing with one's Administrative Local Government, a disgruntled resident or ratepayer is more likely to act to frustrate the administrator by whatever means they have access to, and includes covert or apparently unrelated means. Comments on Facebook effectively display the existence of this kind of activity.

V. Solution to; Dispute Resolution

The Review Paper guidance questions (page 50) and the need for a "*Standards Panel*" become redundant when this solution is adopted as a component of a framework delivering to the "*Community Expectations*" discussed throughout this submission. Most of the questions on page 50 are to the favour of the power of enforcers and hence fail to contribute to the engendering of governance harmony or community leadership, and may actually cause further detriment.

There are two competent solution options which together cannot fail to deliver harmony;

a. Where the matter is a matter of legal compliance, and is clear, and is well understood by all; enforcement of that legal compliance is not optional. The jurisdiction should be the Magistrates Court.

b. Where the matter is not (a), then mediate a resolution guided by the Object and Purpose of the relevant legislation(s) In mediating a matter, the circumstances of both sides should be explored as well as any underlying issue which may have contributed to the raising of the complaint.

c. In both cases followed by actually measuring of the outcome effect, then implementing policy, process and practice changes to prevent a reoccurrence of similar incidents. Complaints or disputation must be **shown to be resolved** in compliance with the object and purpose of the Act. This provides a measure of the competence of application of the legislation

Processes and practical guidance for these solutions already exist and have been long practiced in private industry. There is no legitimate reason why Local Government management should be treated as a special or "sheltered" case as it is not. To do so only adds confusion, reduces effectiveness and hence increases cost in both resource and financial terms. The following need to be addressed in regulations.

d. That a complainant has an option to have a dispute or complaint mediated by the "Australian Mediation Association" or under similar rules. The outcome is proof of finalisation. Complainants do not currently have an option as to where or how a complaint is raised or managed. Often the current party receiving and managing the complaint is the subject of the complaint and hence is in open conflict of interest.

e. That bullying, intimidation and harassment are clearly defined and enforcements applied equally to **all parties**, including paid and non-paid persons, elected persons, volunteers, and the public generally. Applying standards universally will assist in removing prejudice and favouritism.

f. That legal interpretations be required to follow the recommendations of the latest version of "*Statutory Interpretation in Australia*" published by LexisNexis. This publication promotes Law as a benefit to society and not simply a dictatorial control as currently practiced.

3.9. Pecuniary Interests (page 55-56 and 80 - 89);

The rules on pecuniary interest should be simplified to a single rule dictating that; if an elected or employed member of a Local Government (or any associate or family) profits during their term in office or employment, from any third party gift or donation related to

their employment or from a pecuniary transaction or other benefit having a monetary value, affected by a change in policy during their term in office/employment, the dollar value extent to which the profit is due to the position of election or employment or change in policy, shall be forfeit to and recoverable by the Local Government. Irrespective of whether or not the profit had been 'realised'.
This should be a universal policy including applicability to an elected member or employee profiting through a not for profit organisation they were a member of, having received a benefit that was influenced in whole or part by an act, action or decision of that elected member or employee.
An exemption would apply were the profited party demonstrated, beyond reasonable doubt, that they had had no influence or had any participation in the developing or causing of that profit.
A rule such as this makes redundant the compulsion to declare conflict of interest or exclude any person from deliberations as no party to the decision, act or action can hope to profit.
And that their family friends or associates could also not profit, is a much stronger and more equitable control than any prescriptive enforcement practice currently available.
Again the Review proposes adding complexity in prescription instead of addressing the underlying framework failure.

4. Phase 1 Items Tabulated for Review (Review Paper page 10)

4.1. Building capacity through reducing red tape

4.1.1. From a lifetime career complying, applying or enforcing "red tape", I have learnt that the infamous "red tape" is principally an ineffective, inefficient, prescriptive control mechanism used to replace outcome-based assurance measures. A clear understanding of this effect is the key to reducing it.

4.1.2. Most WA legislation is constructed of either loose or tight prescriptive 'up front' controls (including the current Local Government Act) but nevertheless they are prescriptive controls and are usually devoid of outcome focused enforcement.

4.1.3. The generalised observable effect of WA legislation is of establishing a uniform minimum standard. Unfortunately, that although it has forced recalcitrants to deliver acceptability it has also brought down the pursuit of excellence to competition at the lowest available commercial standard.

4.1.4. To break the stranglehold of "red tape" controls, requires a fundamental shift in regulatory thinking away from pre-event, prescriptive thinking toward outcome achievement. Professor Hilmer's, National Competition Policy Review Report of 1993 is an essential read to understanding of the undermining of business development through competition caused and created by both "red tape" controls and Government Enterprise monopolies. Although that review dealt with commercial activity, its transportability to regulatory and "fee for service" regimes of Governments is unambiguous.

4.1.5. Through understanding the purpose and installation factors for "red tape" it becomes starkly clear that the enablement's of "red tape" are inadequacies in the framework of Legislation itself. Inadequacies that are dominantly focused on dictating minimum standards instead of measuring outcome achievement. The Local Government Act and regulations are currently framed to provide controls and not to measure delivered outcomes. A reversal of that conceptual framework to facilitate outcomes guided by

consistency in boundaries will deliver, as a by-product, reductions and simplification of "red tape" in addition to promoting innovation benefits.

4.1.6. The high proportion of complaints and disputation is directly caused by delivered outcome dysfunction identified by the community but which the Local Government shows disinterest in pursuing rectification despite the matters being mostly matters to which "red tape" principles had been applied.

VI. Solution to "Red Tape" (pages 106 – 109)

a. A "*community expectation*" role of Local Government should be the enforcing of outcome accountability of those responsible for delivering the outcome. The FMG/cyclone fatalities event is a clear but extreme example of where "red tape" had reduced the safety outcome and had removed the deliverers responsibility. Similarly, is the Rottnest case of the child killed by a falling brick pillar.

b. For Example builders must be held responsible for the outcomes they deliver and not to petty prescription in spurious regulations. Local Government administrators currently display contemptuous disinterest in the after-construction safety of structures for prevention of injury or fatality. Greater reference to industry codes of practice would facilitate better outcome management.

c. Red tape on building and construction – should be reduced to registration and compulsory insurance only. Insurance would enable rectification after builder is no longer traceable. House and block plans should be an archival service only with designers responsible for the integrity of their designs.

d. A compulsory Red Tape Insurance with contributions by builders (etc), and accessible only to property owners for the purpose of covering cost of injury, damage or rectification required by inadequate/inappropriate building construction. Insurance company should be able to sue the responsible builder for recovery of payouts.

4.2. Meeting public expectations for accountability

4.2.1. Current management of legislation establishes a Local Government as an unaccountable "power" and not as a representation of "Community expectations". As discussed at 5.1.2, elected members are not accountable for their decisions and neither is there any requirement for a Council to publish reasons for a decision made by it in a manner to demonstrate compliance with any "*Community Expectation*". Current practice enables a Council to ignore the "*Community Expectations*" delivered to Council through Electors meetings. This is exampled by the City of Melville Council who have in impunity, simply overridden and discarded every resolution arising from Electors meeting during at least the past 4 years. Use of that power has resulted in degradation of community confidence in the integrity of elected members and shown the council to be unaccountable to the community.

Section 5.33. (2) of the Local Government Act needs to be reworded to remove "if" and then to require Council to properly debate decisions made at an electors meeting and then to further require Council to give substantive reason why "*Community Expectation*" could not be met were Council to fail to endorse the decision of an Electors meeting. The debating by Council of decisions from an Electors meeting must include depositions and/or presentations from Electors as would be expected of parties to any other motion debated.

4.3. Making information available online (page 91 -105)

4.3.1. Many Councils already publish information online. However, these are generally isolated and on a variety of design platforms which contributes unnecessary development cost and limits portability across Local Governments. It would be beneficial both from cost and time resources for the DLGC to facilitate a single platform and then encourage the sharing of components designed and built by different Local Governments to be transportable to other Local Governments. Ie; simplification in sharing development ideas and resources.

4.3.2. Local governments should be encouraged to develop online ‘continuous recording’ functionality enabling a real time construction of ‘Annual Report” items rather than just an end of year snapshot report.

4.3.3. Each and every complaint received by a Local Government or about a Local Government by another Authority must be required by legislation to be published online, complete with a description of each resolution. Naturally privacy of the involved parties must be assured. Root cause analysis and system modification to prevent recurrence must be a legislated role of Council.

4.3.4. An online forum for Electors to ask published questions and be given published responses should be available. This could form a substitute for public question time in Council Meetings. The Chatham House rule could be observed and discussion on a question allowed. By this simple inclusion process, the gap between Local Government and Community could be narrowed. Many low cost commercial models are available including survey models.

4.3.5. The more information a Local Government publishes freely online, the greater is the public respect and confidence in that Local Government.

4.4. Meeting public expectations of ethics, standards and performance

4.4.1. The Review Paper at page 16, paints an unrealistic picture of Local Governments as having “*complex responsibilities*” when the truth is that it is the community that has the responsibilities and it is the Council’s only responsibility to reflect the “*Community’s Expectations*” around those responsibilities. Controversy and complexity only occurs where a Council or LG Administration ignore the community and try to override the “*community’s expectations*” to be their own power.

4.4.2. Similarly elected members and administrative officers have no more challenging a role than that of a community member. “*Community expectations*” for the behaviour and activity of elected members or employed officers, do not exceed that for simply being a member of the community.

4.4.3. Given that Section 1.3.(3) of the current Local Government Act states:

> *“In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity.”*

The setting of a code of conduct / behaviour which segregates and sets apart, elected or employed members of a Local Government from the standards expected of any other member of the Community, fails the legislated "*social advancement*" requirement of section 1.3.(3). And similarly, any failure of behaviour or standard by an Elected or Employed member of a Local Government is an express dysfunction of the legislated requirement for a Local Government, as a whole, to "*use its best endeavours*".

4.4.4. Local Governance fails where the legislative system disables the assurance of election or employment of highly ethical persons and facilitates the longevity of persons lacking substantive moral integrity.

4.4.5. There are two significant legislative failures;

4.4.5.1. The first is the segregation of the Council Members from the Community. The current legislation delivers a substitution of power to a Council Member in place of delivering Community Representation. There is no current legislated capability for an Elected Member to identify, measure or deliver his or her constituents "*expectations*" as the current Local Governance model actively segregates Council from Community.

4.4.5.2. And the second is the current legislated endorsement of monopolistic service/business delivery. In this respect the governance role of the Local Government is clouded by its conflicting commercial undertakings.

Public expectations across ethics, standards and performance are enhanced through delivering Community Representation and opening monopolistic services/businesses to commercial competition. An application and reference to the Corporations Act will support delivery of public expectations to a greater degree than paralleling separate Local Government legislation/regulation.
If the current practice of enabling a Local Government to act as a power is to be retained, then it is essential that the "*Community*" be given the power to enforce accountability for the power of the Local Government. For example, the ability to cause the dismissal of an Elected Member or reassignment of an employed member.

5. Untabulated Review Paper items;

5.1. Relationships between council and administration

5.1.1. At page 17 the Review Paper misrepresents the proper reference to the enablement of Local Government in as much as local governing bodies are required to be "*elected*" while the Local Government Act say that Local Governments shall be "*Corporate Bodies*". The later Act creates confusion by establishing a governance power not permitted by the Constitution Act.

5.1.2. WA Constitution Act 1889 Section 52. (1) "*The Legislature shall maintain a system of local governing bodies elected and constituted in such manner as the Legislature may from time to time provide.*"

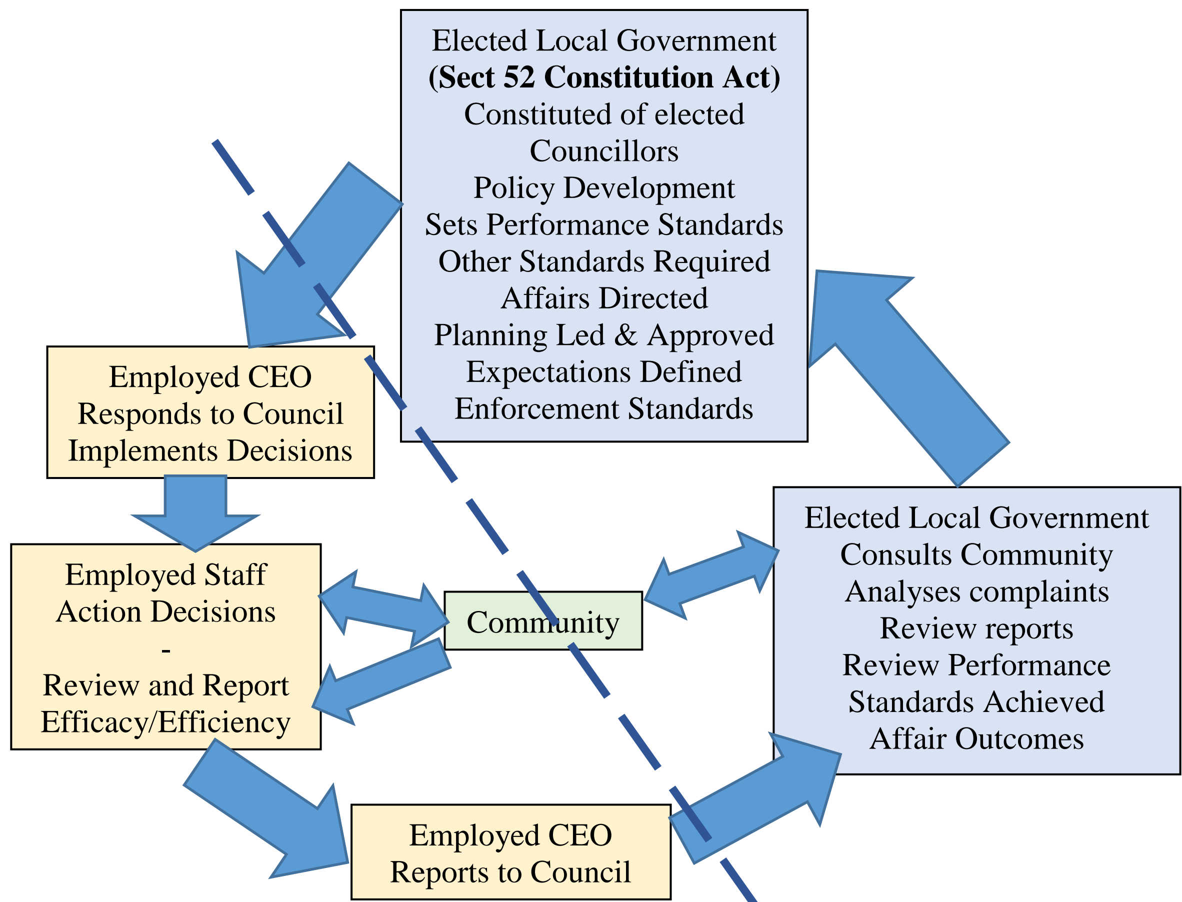
5.1.3. However, the Local Government Act, section 3.62 say that a "*local government is a body corporate with perpetual succession and a common seal*". As a body corporate it is staffed by unelected employees in contradiction of the Constitution Act the LG Act imports upon the LG Administration a perception of a governance power not consistent with the Constitution Act.

5.1.4. The Local Government Act is littered with confused and contradictory references to what is governance and the jurisdiction of the proper Local Government and what is administrative matters of the Corporate body.

5.1.5. It is not true that a Local Government under the Constitution Act can sue or be sued as that is confusingly the "Council" described under the LG Act. However, it is true that the administrative arm of the Local Government is a corporate body which can sue or be sued. Unlike directors under the Corporations Act, elected members cannot sue or be sued in relation to their role and decision making while in office. Currently the Constitutional "Local Government" (the Council) is above the law and because of this, individual members of the council are unaccountable to their roles. Even in the case where a Council becomes dysfunctional; a) the determination of dysfunction is by the State and not by "*Community Expectation*" and b) the result is a sacking of the elected members only and no other accountability nor measure of accountability.

5.1.6. Multiple references throughout the Local Government Act to the Administration arm as being the "Local Government" contribute to a confusion of roles through imparting powers to the Corporate Body over the elected body and by that disabling the power of the true governing body effectively reversing the roles described in the Constitution Act.

Community Expectation on Separation of Powers
(Local Govt Act Review Paper 2018 page 19)



5.1.7. A further complication arises at section 3.18. of the Local Government Act where the Act delegates "self-regulation" to the determination of "inappropriateness" of services or facilities provided by the Administrative arm of a Local Government. This clearly contradicts section 2.7 of the same Act which states it is the role of Council to govern the affairs and is responsible for the administrations performance. This is just one more example of conflict created within the current legislation.

5.1.8. In further confusion, the Council employs the CEO but the CEO then determines eligibility of the Elected Councillors thus expresses a power over the Councillors capable of influencing the decision and loyalty of those Councillors.

5.1.9. The current Act implies that the CEO is a member of the "Council" and may take part in deliberations but does not have a vote. Because of his day to day capacity to influence Councillors, the CEO should be expressly excluded from contribution to Council during meetings, save and except in answering a direct question of him/her.

5.1.10. Local government CEO's hold privileged positions of employment as the Council is responsible for the CEO's performance yet the CEO holds control of the means by which the Council is required to measure that performance. Councillors must have unfettered access to administrative officers for the purpose of understanding and measuring functions and performance.

5.2. Training

5.2.1. There is nothing unique or challenging in the role of councillor and any list of famous exceedingly wealthy corporate entrepreneurs who had not finished schooling is testament to the fallacy that a sound education is essential to ethical or competent business success. That said, many people who aspire or become councillors could still benefit from corporate directorship training particularly in the area of respect and consideration for others. However. making training compulsory creates a penalty on those already skilled and can simply make those already corrupt, more skilful in their corruption.

5.2.2. **How would training be beneficial while there is no enforceable accountability on being a Councillor?**

5.2.3. Training for the DAP is questionable as the observable outcome is that the "*Development Assessment Panels*" are probably unconstitutional in that they contradict section 52 of the Constitution Act by managing matters under the clear jurisdiction of Local Government. And further that they are generally despised by the community as being politically motivated instruments corruptly orchestrated to be knowingly careless of "*community expectations*".

5.2.4. Any Council that is working effectively and efficiently will already be including training as a compulsory agenda item at their normal meetings. There is nothing that Councillors require to know that could not be easily and simply delivered inhouse as a component of their normal meeting structure.

5.2.5. Training individual councillors is time consuming and limited in benefit as it serves only the councillors own interest. If on the other hand, a council engaged with the community in delivering to the community, sessions about council, and skills useful to

councillors then it is highly likely such engagement would encourage a higher participation rate in Local Government as well as providing general skills benefit to the community.

5.2.6. Similarly, with Professional development, it is cost prohibitive unless it is delivered for community benefit instead of Councillor benefit. Such narrow thinking in training delivery will discourage participation and encourage class discrimination. Delivery in public forums will encourage participation and enhance community skills.

5.3. Behaviour of elected members is segregated

5.3.1. The existing behaviour of elected members and employees is a function of and directly results from the prescriptive content of the Local Government Act and its regulations. The terminology used such as "minor breach" and "serious breach" are example to the childishness applied to offences and further toyed with by the delivery of penalties such as only required to give an apology. The use of these terms is that expected of a bully out to humiliate his peers and is not about building good relations. The construction of the Act is toxic and offensive so it comes as no wonder that the effort to manage complaints has grown as reported.

5.3.2. The overwhelming majority of complaints will disappear once the Act is rewritten to deliver respect for persons along with a professional credibility delivered through endorsement of the Corporations Act provisions.

5.3.3. The Table on page 41 of the review provides a greater insight to the systemic failure or dysfunction of the framework of Local Governance than it does to any particular paucity of respectful behaviour. Simply attempting to repair or rectify a framework failure by installing a "Code of Behaviour" is laughably doomed to fail.

5.3.4. As with the construction style of the Act, the dispute and breach system is also designed to focus on delivering bullying and intimidation to force a result instead of seeking to engender harmony through mediating a consensual outcome. Codes of conduct can be constructed, modified or debated, 'until the cows come home', and the result will remain unchanged because the underlying addressing of respect is not a visible component of current codes of conduct. Whilst compliance with the Act itself remains virtually unenforceable, and most certainly unenforceable to "*Community Expectations*", enforcement of an Elected Members' code of practice is little more than a joke.

> "*As Emeritus Professor Geoffrey Walker, has written in his defining work on the rule of law in Australia: '...most of the content of the rule of law can be summed up in two points:* ***(1) that the people (including, one should add, the government) should be ruled by the law and obey it*** *and* ***(2) that the law should be such that people will be able (and, one should add, willing) to be guided by it.'"*** (Rule of Law Society of Australia)

5.3.5. It is important to recognise the installing of universal application and the necessity of "*willing to be guided*" as crucial in the design and construction of law. Installing dictatorial prescription favouring the enforcers view, fails to engender goodwill and becomes self-defeating as it is then guaranteed to fail, as is easily recognisable in the current failure of efforts to force behaviour standards compliances.

5.3.6. A further compounding of behaviour standards failure comes with the community's recognition that Local Government administrators are not able to be held to account for their non-compliances.

5.3.7. A successful code of conduct will focus on positive behaviours and activity that are capable of public measurement in a manner which places election or employment in Local Government as an enviable status.

5.4. CEO Recruitment

5.4.1. The Review Paper guidance question on pages 61 & 62 and associated discussions on the employment of CEOs is symptomatic of adding complexity in place of resolving the underlying framework failures.

5.4.2. Because of the existing legislated power of the CEO over the Elected Government; employment selection is critical and problematic. Where the Framework of the Act returns the Constitutional authority of the Local Government back to the 'Elected' Council and delivers controls through that framework and its linking to Corporations Law standards; selection and recruitment of a CEO simply becomes a function of measurable performance and well within the ambit of any Council.

5.4.3. At all times the appointment and continuity of service of a CEO or acting CEO must remain the jurisdiction of the Elected Council. There should be nothing preventing a Council from pre- nominating that a particular person may act as the CEO for multiple short periods of time during a nominated period of time during the tenure of an appointed CEO if or when the CEO may be absent.

5.5. Senior Employee Employment (pages 109 – 111)

5.5.1. Although the CEO would normally be responsible for the day to day administration of employment and dismissal of Senior staff, for as long as the Council is held responsible for "performance" then there is no option but to enable the Council to override the CEO's selection.

5.5.2. If however the accountability for "performance" is transferred to the CEO and that accountability of the CEO is enforceable then and only then can the total control of senior staff be transferred to the CEO's jurisdiction.

5.6. Performance Appraisal (page 66 & 68)

5.6.1. Performance review and appraisal is currently problematic because it is not objectively defined, leaving it up to the subjective opinion of the reviewer.

5.6.2. The framework Act must clearly identify what is meant by "performance" and how performance will be measured.

5.6.3. Once defined, it then becomes viable to enshrine part of performance reviewing as a common standard in the Act and part to the particular and varying needs of the Local Government. In this manner appraising performance is simplified to a measurable quantitative product against a pre-identified quantum. This makes the measure continuously identifiable and available in place of the current one-off, retrospective and subjective guessing.

5.6.4. The absolute top of the list for performance review must be the management of complaints and disputes. These are the expression of "*Community Expectation*" so if that expectation is not measured then the Local Government is not seen to be objectively delivering to "*Community Expectations*". In every case where a Council has been suspended, it has been a failure to resolve underlying (root Causation) complaints and disputation which has led to those sackings.

5.6.5. Again, if performance is measured then it must be <u>universal across both elected and employed persons</u>. There must be a clear consideration that the greater the autonomy of decision making of the particular position the greater the importance of performance measuring and assessment. Failure to do so lends weight to class discrimination and the playing of favorites.

5.6.6. When an objective system of measuring performance is installed the question of conviction of past offence being a prohibition on employment (page 69) becomes redundant because any recidivism is readily observable and measured.

5.6.7. Management of performance reviews by the Public-Sector Commission should be avoided at all cost to avoid the politicization of those reviews. The PSC is aligned to the State Government of the day and does not represent the "*Community Expectation*".

5.7. Extension or termination of the CEO (page 66)

5.7.1. To avoid manipulation of the Council against "*Community Expectations*" across times of changes in the make-up of the Council there should be a moratorium period of three to six months either side of an election of Councilors in which a CEO cannot be extended nor terminated. Similarly, a new CEO appointment should be prohibited during the six months prior to an election of Councillors but not after their election.

5.8. Supporting local governments in challenging times (pages 70 – 76)

5.8.1. means that the circumstances in which the State Government can reasonably intervene in local government affairs are limited. For instance, the State Government cannot intervene in

5.8.2. The making and upholding of "*lawful decisions*" made by a Local Government when such decisions are inconsistent with broader "*community expectation*" is a direct contradiction of the object and purpose of the Act. Further, and in all likelihood, also a contravention of the Constitution Act because it fails the test of "*better government of the area*". Again, this is a framework dysfunction in the Act which has enable breaching of the object and purpose of the Act to effectively make the substance of the legislation unenforceable. It is ludicrous from a "*Community Expectation*" perspective, that a decision, 'unlawful' by the purpose and object of the Act, is made 'lawful' simply by the incompetence of the framework of the Act disabling enforcement of its purpose and object.

5.8.3. A legislative instrument that has power to enforce provisions but is incapable of enforcing the Object or Purpose of that law, delivers nothing more than an impost on society. Again, this is a contributor to the current visible issues across Local Governance for which an increasing of the complexity or prescription of 'interventions' will fail to correct while the underlying failure cause is retained.

When the object and purpose of this Legislation is made enforceable, then any decision made which does not then comply with the object and purpose of the Legislation, becomes an unlawful decision. This effectively means that the "*power of general competence*" becomes a measurable item against the parliamentary intent of the Legislation and not as currently, measurable only against a poorly drafted and singular prescriptive item of the Legislation

So once again the underlying issue is a framework failure and not a matter requiring further complexity through adding otherwise unnecessary intervention prescription.

5.9. State and Local Government Employment (page 77)

5.9.1. Both State and Local Government employment are currently cases of "sheltered" or "protected" employment, enjoying benefits not available to private sector employment. To further enhance that protection widens the class gap and unreasonably burdens the public purse. Any changes should be universal to the benefit of opportunity of persons to transfer or enjoy secondments between any employer, Government or private.

6. Concluding Statement

6.1. The majority of issues and complexities raised in the Review Paper are directly caused by underlying framework dysfunction. Resolving the framework failures will substantially reduce the complexity of the legislation and its associated red tape and other restrictions.

6.2. The commercial conflict of providing monopolistic services while simultaneously holding jurisdiction for the laws and powers for those services, is detrimental to integrity of Local Governance delivery.